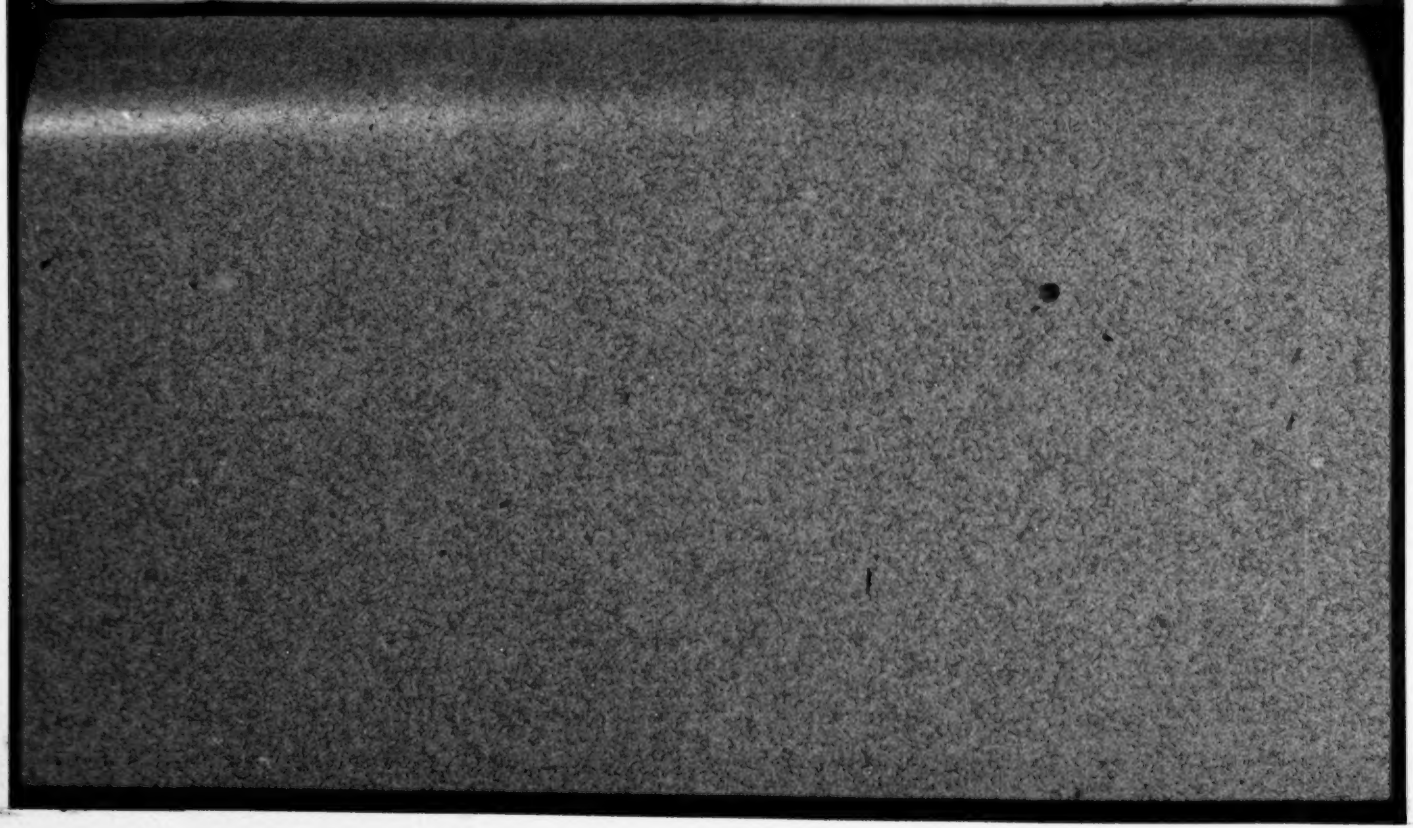


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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 312.

THE MIDWAY COMPANY, Plaintiff in Error.

vs.

FRANK W. EATON, LEONIDAS MERRITT, MERRILL M. CLARK, RICHARD H. FAGAN, AND MARGARETHA LONSTORF, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The action terminating in the judgment upon which the Writ of Error issued in this case was brought by the Midway Company, the plaintiff in error, as plaintiff, against Frank W. Eaton, Leonidas Merritt, Merrill M. Clark, Richard H. Fagan and Margaretha Lonstorf, defendants in error, as defendants in the District Court of St. Louis County, Minnesota, and was a statutory action to determine adverse claims to certain real estate, to-wit, three, 40 acre tracts de-

scribed as lots three, five and six, of section thirty, township sixty-three, north of range eleven west of the fourth principal meridian, according to the Government survey in said St. Louis County, Minnesota.

The plaintiff claims title under a patent issued by the United States, May 10th, 1898, to one Frank Hicks, from whom, subsequent to the entry of said Hicks but prior to the issue of the patent, the plaintiff purchased the lands in controversy, to-wit., on October 21st, 1897.

The defendants claim title under a certain location of Sioux Half-Breed scrip issued under the Act of Congress of July 17th, 1854 (10 Stat. 304) such location having been made by the said Frank W. Eaton on June 16th, 1883, upon lands then unsurveyed embracing those in controversy, the other defendants claiming under said Eaton. This location was cancelled in pursuance of a decision of the Hon. Wm. F. Vilas, Secretary of the Interior, dated February 18th, 1889 (unpublished) a copy of which is annexed to and made a part of the findings of the trial court; (Record pp. 63-81.)

The defendants, Merritt, Fagan and Clark joined in an answer (Record p. 4); the defendant Eaton answered separately (Record p. 307). The defendant Lonstorf stipulated that the answer of Merritt, Clark, and Fagan, should stand as her answer (Record p. 47). The answers of the defendants are identical in form and substance as to all material matters, and allege substantially that Eaton was the duly constituted agent of the Half-Breed; that substantial improvements were made upon the land in question, under the authority and for the benefit of the Half Breed; that all of the acts done in the location of the scrip were done by or on behalf of the Half-Breed, in order that she might acquire the lands in controversy to dispose of the same if she so desired; that she had never sold or assigned her scrip and that there was nothing in the record before the Secretary to justify his findings of fact.

The evidence adduced upon the trial was wholly documentary, consisting (aside from documents relating to chain of title, as to which there was no dispute) of the record before the Land Department, upon which was based the decision of the Secretary of the Interior.

The principal ultimate facts established by the decision of the Secretary are substantially that the Sioux Half-Breed scrip in question had been sold and disposed of by the Half-Breed, to some one unknown, accompanied by two powers of attorney executed in blank, one to locate the scrip, the other to sell the lands located upon. That Eaton purchased this scrip accompanied by the two blank powers of attorney for the purpose of using the same for his exclusive benefit, inserting therein his own name in the blank power to locate, as the attorney for the Half-Breed and that of his business partner, Leonidas Merritt, in the blank power of attorney, to convey, and after some improvements had been made upon the lands in question, then unsurveyed, by certain persons employed by Eaton, who were to have an interest in the land, Eaton, upon making the affidavit required by the rules and regulations of the Land Department "that said improvements were made under the personal direction of said Orillie Stram (the Half-Breed) and for her personal use and benefit," located the scrip upon the premises in question, and thereafter caused the lands located upon to be conveyed to himself and his employees or associates.

The Secretary further found that the whole transaction was, and was intended to be, for the purpose of enabling Eaton to use and acquire this scrip for himself and his associates in order that by means thereof he and his associates might acquire the lands in question; that Orillie Stram, the Half-Breed, had and was intended to have, no interest whatever in the matter; that she neither made nor had anything to do with the so-called improvements upon the premises;

that she had sold and disposed of the scrip, as such, using the device of two blank powers of attorney to accomplish that end, and that the affidavit made by Eaton, upon which the location of the scrip was allowed, was false. The Secretary refers to the case of Allen vs. Merrill (8 L. D. 207) decided by him on the same day, for the reasons in extenso, for his conclusions of law.

The findings of fact and conclusions of law of the trial court are found at pages 51-63 Record. Thereby the trial court finds that the findings of fact by the Secretary of the Interior above referred to were fully sustained by the evidence before him. (Record, page 59.) The decision of the Secretary also contained a statement of some minor or subordinate facts appearing from the record as follows:

1. That the improvements made by Eaton were "slight * * * * scarcely deserving of the name."

2. That the scrip in question "after many years and after passing through several hands" lodged in Eaton's hands.

3. That the Half-Breed had sold the scrip "long prior to the location."

4. That the scripee "never saw the land."

5. That the Half-Breed for a long time "directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatever."

These latter propositions the trial court finds were not sustained by the evidence before the Secretary, holding:—

1. As to the character of the improvements made by Eaton that they "consisted of a house about 14 by 16 feet in size."

2. That "it did not appear that the scrip referred to had passed through many hands or through any hands before coming into the hands of the said Frank W. Eaton."

3. "That it did not appear from the evidence before the said secretary that the said scripee never saw the land."

4. That it did not appear from the evidence before the said Secretary that she (the scripee) had "sold the said scrip long prior to the location thereof."

5. That it did not appear from the evidence before the said Secretary that "for a long time she (the scripee) directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatever."

6. That it appeared from the evidence that the powers of attorney to locate and convey were executed in blank by the Half-Breed "about one week before the location of the said scrip by the said Frank W. Eaton."

EVIDENCE BEFORE THE LAND DEPARTMENT.

Eaton's case as presented to the Land Department, by the testimony of Eaton himself, and that of his own witnesses disembarrassed of all conflict in the evidence, and of all minor questions, was as follows:

The defendant Eaton wish to acquire a valuable tract of unsurveyed land supposed to contain mineral, situate in the wilderness about one hundred miles to the northeast of the city of Duluth.

One Edward Byrne, who was by occupation an explorer of mineral lands, together with one Clement, who followed the same occupation, in or about the first part of May, 1883, discovered that the lands embraced within what when surveyed would be section 30, contained valuable deposits of iron ore. Both Byrne and Clement were at the time of the discovery, and for some eighteen months previously had been in the employ of the Minnesota Iron Co., for the purpose of exploring for minerals. So far as appears the fact

of this discovery was never communicated to the Minnesota Iron Co., but Byrne came to Frank W. Eaton at Duluth, who was in partnership with one Leonidas Merritt, under the firm name of Eaton & Merritt, and told Eaton of his discovery. Eaton thereupon employed Byrne to go to this land, furnishing him with money and provisions, and make a homestead settlement, with the agreement that when the title had been secured he (Byrne) the ostensible homesteader, should receive one-third of the land. Eaton instructed Byrne to hold possession of the lands by force; Byrne associated two other persons with him, Clement and one Power, under the agreement that each, for aiding him in his homestead claim, should receive one-third of the one-third that Byrne was to receive from Eaton. These three persons, Byrne, Clement and Power, went to the land in question and made the improvements which afterwards served as the basis for the location of the Half-Breed scrip hereinafter referred to. They staked out the lands and put the words "Homestead Claim" on the stakes. They put the same words on the shanties they erected. They patrolled the land with guns to keep other settlers off, "under Eaton's direction." Meanwhile Eaton, who had no scrip at the time he sent these homestead settlers to the land, began to negotiate for some, and from one Byron M. Smith, a broker and dealer in scrip, in Minneapolis, he bought two pieces of Sioux Half-Breed scrip, accompanied by two powers of attorney, one to locate, the other to sell the land after location, both executed in blank as to the name of the attorney and the description of the land. He then sent an employee, one Richard H. Fagan, a defendant in this case, to get a description of the land and of the improvements being made by the homesteaders, and after filling in his own name in the power to locate as well as the description of the land, he went to the land office, produced his power to locate as attorney for the Half-Breed and made the affidavit required

by the rules of the Land Department that "said improvements were made under the personal direction of said Orillie Stram and for her personal use and benefit." Whereupon the location was allowed. Thereupon Eaton immediately sent the defendant Fagan and Leonidas Merritt, his business partner, to the land to call off the homesteaders, the scrip having been located, and they immediately came away from the land and abandoned the so-called improvements which consisted of two shanties without chimneys or fireplaces, without windows other than holes cut in the logs, the doors being hung on leather hinges; which shanties had never been inhabited up to the time the homesteaders left and never were afterwards, being immediately allowed to fall into decay. Upon the arrival of the homesteaders in Duluth, Eaton, having filled in or caused to be filled in, the name of his business partner, Leonidas Merritt, in the power to convey caused him to convey to the homesteaders their agreed interests in the land and caused him to convey to himself, Eaton, the balance. The Indian never saw the land or had anything to do with it; she never saw Eaton until March 31, 1886, and Eaton himself never saw the land. (See testimony of Eaton and Byrne, Record pp. 108 and 117.) He both bought the scrip and located the same upon the lands for his own exclusive benefit and that of his associates in the enterprise and the Indian was to have no interest whatever in it. This, Eaton himself testified to, in the following language: "I made the improvements under the supposition that when he conveyed to me her scrip and power of attorney to locate the same for a valuable consideration and the further contract on her part for a valuable consideration to fully confirm all my acts and also the acts of Leonidas Merritt, her attorney in fact, for the purpose of conveying the lands located under and by virtue of said

Half-Breed scrip, that all her rights to any land as far as she was concerned was thereby transferred." (Folio 336.)

And in response to the following questions he testified as follows:

Q. Then you located those pieces of scrip for the purpose, through them, of obtaining title to the lands they should cover, yourself? A. My intention was to have an interest in it. I did not expect to have the whole.

Q. Who else did you expect to have an interest? A. Mr. Merritt, Mr. Fagan and Mr. Byrne, that is all. (Folio 332.)

Eaton also testified that he agreed with Byrne in consideration "of the land proving valuable as he represented to me, and in consideration of his erecting or causing to be erected for me valuable improvements on two locations of one hundred and sixty acres each, that I would pay his expenses necessarily incurred in doing the work, that I would locate the scrip upon the land and as soon thereafter as the location was completed I would cause to be conveyed to him an undivided one-third interest in the land." (Folio 697.) Eaton had no scrip at that time. (Folio 715.)

The judgment entered in conformity with the findings of fact and conclusions of law of the trial court (Record 302-4) adjudged that Eaton and his co-defendants were the owners of the lands in controversy; that the plaintiff had, at the best, a bare legal title thereto under the patent from the United States, which title, if any it had, it was adjudged to hold in trust for the defendants.

The case was heard by the trial court and submitted in June, 1899, and the findings of fact and conclusions of law above referred to were filed on the 27th day of December, 1899. Attached to the findings of fact and conclusions of

law was a memorandum consisting of eight printed pages (Record 86-94) in which the trial court gives its reasons for its decision, but in which no mention is made of the fact that the location in question was upon unsurveyed lands. On December 30th, 1899, the court filed a detached paper consisting of twenty-six printed pages entitled "A memorandum" in the case in question in which the court argues the correctness of its conclusions at great length, adverts for the first time to the fact that the location in question had been made on unsurveyed lands, and presents additional reasons for its decision.

This second memorandum is found in the Record at pages 275-301.

A case showing the evidence adduced upon the trial was duly settled, allowed and made a part of the record (p. 272). The only portion thereof needing consideration under the findings is the testimony before the Land Department and such part of the record and exhibits before that department as were introduced in evidence before the trial court. This evidence before the Land Department is found at pages 108-128 and pages 199-266 of the Record and it over-laps in part, a transcript of the testimony of the witnesses Eaton and Byrne, having been introduced by the plaintiff as Exhibit "B." (page 107) and a transcript of the testimony of all of the witnesses before the Land Department including that of Eaton and Byrne having been introduced by the defendants as Exhibit 2. (Record, pages 197-266.)

From the judgment so as aforesaid rendered against the plaintiff and in favor of the defendants, the plaintiff appealed to the Supreme Court of the State of Minnesota, by whom, in pursuance of its decision filed May 16th, 1899, final judgment was rendered on May 29th, 1899, affirming in all things the judgment of the trial court.

On June 4th, 1899, a Writ of Error to the Supreme Court of the United States to review the judgment aforesaid, was allowed and issued.

While the case at bar involves but three forty-acre tracts of land, it is a test case to determine the validity of the title to the whole three hundred and twenty acres located by Eaton, as set forth in the decision of the Secretary, the title to all of which under the patent from the United States government is in the plaintiff in error, Eaton and his co-defendants claiming title to all thereof under the scrip locations. The matter of the title to this land has been in litigation before the Land Department and before the courts, State and Federal, for more than sixteen years, and decisions affecting the rights of various claimants to the same or portions thereof will be found not only in the unpublished decision of the Secretary, a copy whereof is annexed to the Findings, but in the following cases:

Hyde et al. vs. Eaton et al., (on Review) 12 L.D. 157.

McDonald et al. vs. Hartmann et al., 19 L. D. 547.

McDonald et al. vs. Hartmann et al., 20 L. D. 324.

Germania Iron Company vs. U. S. 165, U. S. 379.

Germania Iron Company vs. James, U. S. C. C. of Appeals, 89 Federal Reports, 811.

Midway Co. vs. Belden, 98 Federal Reports, page 23.

The questions presented and necessarily involved in the consideration of the correctness of the judgment in question are:—

First. Whether the clause in said act of July 17th, 1854, "and, provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid" restricted alienation thereof by the Half-Breed beneficiary and pro-

hibited acquirement thereof by a purchaser in advance of location, for the purpose of locating the same for his own benefit.

Second. Whether a device whereby a person purchases such scrip from a broker or third person, accompanied by two blank powers of attorney, one to locate the scrip and the other to convey the lands after location, who afterwards fills up the blanks and locates the scrip upon unsurveyed lands, the whole transaction in the matter of acquiring the scrip and locating the land, being confessedly for the sole benefit of such person and his associates, to whom he causes the lands after location, to be conveyed by means of the other power of attorney, is an evasion of the provisions of the Act of Congress of July 17th, 1854, relating to the non-assignability or transfer of the scrip in question or as to the location thereof upon unsurveyed lands.

Third. Whether the clause in said act designating the classes of lands upon which said scrip may be located and allowing its location "upon any other unsurveyed lands upon which they (the Half-Breeds) have respectively made improvements" requires any improvement whatever by the Half-Breed as a condition precedent to a valid location, and whether if said clause does require such improvements they can be made by a third party, who, having purchased the scrip, attempts to locate the same upon unsurveyed lands for his own benefit.

Fourth. Whether the mere adjustment of the boundaries of a location upon unsurveyed lands to the lines of the government survey, after the filing of the plat thereof in accordance with the rules of the Land Department, operated to purge the location of any fraud or invalidity attaching to it and by such adjustment make it a location as of surveyed lands.

Fifth. Whether the Land Department had the jurisdiction to inquire into the matter of any fraud or invalidity in the location of the scrip in question and to cancel the location upon proof of the existence of such fraud or invalidity.

Sixth. Whether the findings of the Land Department upon questions of fact are conclusive.

Seventh. If an act of Congress relating to the public lands has been understood, applied and enforced in a particular manner for the period of forty-six years by the Land Department and the Courts, State and Federal, including the Supreme Court of the United States, in accordance with what the courts have declared to be the clear import of its language, upon the faith of which property rights have been acquired, is a court at liberty to enter upon the construction of the act as a new question.

Eighth. Whether in this case, the question being a purely Federal one, was the State court bound to follow the decisions of the Supreme Court of the United States in Felix vs. Patrick (145 U. S. 317) and Carter vs. Ruddy (166 U. S. 493).

ASSIGNMENTS OF ERROR.

The plaintiff in error assigns as error in the judgment of the Supreme Court of the State of Minnesota:

1. The court erred in holding that the Land Department of the United States had no authority to cancel the locations of the Sioux Half-Breed scrip, issued under the Act of Congress, approved July 17th, 1854, and under which locations the defendants in error claim title.

2. The court erred in holding that the plaintiff in error holds the title derived under the patent issued by the United States, for the premises in controversy in said action, in trust for the defendants in error.

3. The court erred in holding that the defendants in error were and are the owners of the premises in controversy in said action.

4. The court erred in holding that the findings of fact of the court below justified its conclusions of law.

5. The court erred in holding that the title to the premises in controversy in this action, passed to Orillie Stram, nee Moreau, by virtue of the location of Sioux Half-Breed scrip, under which the defendants in error claim title.

6. The court erred in not holding that the findings of fact of the Secretary of the Interior, set forth and embodied in his decision of February 18th, 1889, were final and conclusive.

7. The court erred in not holding that the findings of fact of the Secretary of the Interior, set forth and embodied in his decision of February 18th, 1889, were sufficient to warrant and sustain the action of the Land Department of the United States in cancelling the Sioux Half-Breed scrip locations under which the defendants in error claim title.

8. The court erred in affirming the judgment of the court below.

9. The court erred in not reversing the judgment of the court below and directing judgment for the plaintiff in error and against the defendants in error, as prayed in its complaint.

ARGUMENT.

At the outset we assert that each controlling question in this case has been answered by the Supreme Court of the United States as clearly and emphatically as it is possible for any question to be answered and our position is, that the Supreme Court of the State of Minnesota was bound

without question and without argument, to follow those decisions of this court as the law of the land so declared by the highest tribunal. These decisions, Felix vs. Patrick, 145 U. S. 317 and Carter vs. Ruddy, 166 U. S. 493, declared respectively the policy of the act in question as evidenced by its clear language, affirmed the supervisory power of the Land Department and pronounced a transaction whereby a person attempts to acquire, by means of two blank powers of attorney, scrip issued under the act in question as a fraud upon the Indian; against the letter and the policy of the law, and a palpable device to evade the provision of the law against the assignment of the scrip. In the case of Felix vs. Patrick the decision related to a location made in 1861 upon surveyed lands and at a time when no affidavit was required, (as in 1864 and subsequently,) that the reservee is living and that the location is made for her sole use and benefit; the case at bar related to a location upon unsurveyed lands requiring improvements by the Half-Breed and also proof that they were made by her and for her sole use and benefit.

The Supreme Court of Minnesota has not even referred to these decisions; it has completely ignored them as well as the law which they established and declared, and in so doing we respectfully submit that the rights of the plaintiff in error under the law and under the Constitution, have been violated, the Constitutional guaranty being of the right to have the law of the land as declared and announced by the proper tribunal, administered without regard to the views of the court administering such law; and that a refusal to so administer the law constitutes a denial of justice. As the Supreme Court of Minnesota has, however, both ignored and over-ruled these decisions and in the argument in support of its views has stated various propositions, and because also of the wide range of the argument of counsel for defendants in their briefs in the court below, we shall

present all of the authorities or matters in anywise bearing upon the act in question, which authorities will be found to establish the following proposition:—

I.

THAT NEITHER IN THE MINDS OF THE COMMITTEE ON INDIAN AFFAIRS WHO DRAFTED THE BILL IN QUESTION AND PRESENTED IT TO CONGRESS WITH THE REASONS FOR ITS PASSAGE, NOR IN THE MIND OF THE CONGRESS THAT PASSED THE BILL IN QUESTION AND THE SUBSEQUENT AMENDATORY ACT OF MAY 19TH, 1858, NOR IN THE LAND DEPARTMENT OF THE UNITED STATES OR COURTS, STATE AND FEDERAL, INCLUDING THE SUPREME COURT OF MINNESOTA, AND THE SUPREME COURT OF THE UNITED STATES COVERING A PERIOD OF FORTY-SIX YEARS FROM THE PASSAGE OF THE ACT IN QUESTION AND DOWN TO THE TIME OF THE DECISION OF THE SUPREME COURT OF MINNESOTA, COMPLAINED OF, IN MAY 1900, HAS THERE EVER BEEN A QUESTION AS TO THE MEANING OR OBJECT OF THE CLAUSE AGAINST THE ASSIGNABILITY OF THE SCRIP OR RELATING TO ITS LOCATION UPON LANDS EITHER SURVEYED OR UNSURVEYED; THAT ON THE CONTRARY, THE LANGUAGE OF THE ACT HAS NEVER BEEN CONSIDERED SUSCEPTIBLE OF MORE THAN ONE MEANING WHICH HAS BEEN UNIFORMLY GIVEN TO IT, VIZ: THAT THE RIGHT TO ACQUIRE PUBLIC LANDS BY MEANS OF THIS SCRIP, WAS A PURELY PERSONAL RIGHT IN THE ONE TO WHOM THE SCRIP ISSUED.

(A.)

The legislative history of the Act of Congress of July 17, 1854, and the reasons for its passage with particular reference to the clause against the assignability of the scrip issued thereunder and requiring improvements by the Half-Breed as a condition precedent to its location upon unsurveyed lands.

The act in question was known as H. R. No. 338 and was favorably reported to the first session of the Thirty-third Congress, April 28, 1854, (H. Rep. No. 138) by Daniel B. Wright from the committee on Indian Affairs. Which report also embodied a report of the Department of the Interior from the office of Indian Affairs dated March 4, 1854, made by George W. Manypenny, Commissioner. We quote from the report, at page one, of the Committee on Indian Affairs:—

> "The Indian titles to the whole of the country surrounding said reservation are now extinguished, and the bands to which said surrounding country belonged have removed westward, and many of the less cultivated of said Half-Breeds are desirous of disposing of their interest in said reserve and following their Indian relatives. Some have already gone. Justice, humanity and sound policy alike second their desire; for all experience demonsrates the utter incompatibility of the uncivilized Indian with civilized life. Many of them, however, are represented as being educated, and having judgment and experience sufficient to take care of their own interest. A number of them are said to be men of much intelligence, possessing property, and having become citizens of Minnesota and the adjoining States.. Some of them have served in the legislature and filled offices of honor and trust in the Territory, while others are engaged in agriculture, mercantile and other profitable pursuits. With them, at least the object of the fostering policy of the Government has been attained, in

fitting them for civilized life; for, in point of intelligence and civilization, many of them would compare favorably with their white brethren."

We also quote from the report of Commissioner Manypenny at pages 11 and 12:—

"I am informed that many of the Half-Breeds are very competent to manage their own affairs, and that they have good improvements on the reserve. It is said that others are altogether incompetent to take care of property. Some of the thrifty Half-Breeds, it is said, have gone off of the reserve, and bought land and made improvements; being unwilling to do so on the reserve, because they could not have land assigned to them in severalty.

No good can result to the Half-Breeds by the continuance of this occupancy in common. Some legislation will, in my opinion be necessary before a change can well be made, if for no other purpose than to protect the interests of such portion of these people as are incompetent to manage their own affairs.

Whether the executive discretion be exercised, and the land set apart in severalty, or the proposal to issue scrip in lieu of the land be adopted, *some legislative provision to guard the interests of the incompetent will be necessary.*—(A copy of the report quoted from is annexed to this Brief as Appendix C.)

Proceeding now to the history of the bill before Congress we find the following explanation made in the House by Mr. Wright on behalf of the Committee on Indian Affairs when the bill was under consideration there. See Congressional Globe, part two, 1854. Page 1114.

We quote from his explanation as follows:—

"The first provision of the bill, it will be observed, authorizes scrip to be issued to Half-Breeds who were entitled to it under the treaty of Prairie

du Chien of May 15, 1830, upon condition that they made a relinquishment to the Government of the United States, under such form as may be prescribed, of all the interest they possess in that reservation.

It will also be observed by the committee, that there is no power under the bill to dispose of that scrip. *The object of the Committee of Indian Affairs in reference to that was to prevent the Half-Breeds from being imposed upon in the disposition of their land. The committee was fully aware that the moment the patent issues the power of disposal attaches.*

The bill also secures to the Half-Breeds the right of pre-emption. This is thought proper in order to secure the interests that were intended to be conferred on the half-breeds of the Sioux Tribes of Indians."

An inquiry having been made as to why an exchange of land is made for scrip, Mr. Wright answered:

"For the reason that you can only obtain the objects contemplated in the treaty by such a provision. *They are those who have moved beyond the limits of Minnesota, and who occupy their farms, who are cultivating them and are not residents within the limits of Minnesota Territory. The object of the bill is to give these Half-Breed Sioux scrip, so that they can avail themselves of the benefit of their own labor by securing the lands upon which they have settled.*

"In addition to this I would say that this bill opens up the reservation for settlement by white citizens within its limits.

"And for the information of the Committee I would say, that it is only the most civilized of the Half-Breeds who have remained there. Those who have preferred uncivilized life and Indian habits have gone beyond the limits of the reservation. They are, however, entitled to the benefits secured or intended to be. Hence the provision in the bill authorizing them to receive scrip. *But in order to induce them to take care of their rights the bill provides that they cannot dispose of their scrip until they have located it; and as I stated before, when the patent is*

issued to them, then they shall have the power of disposing of their land, and of receiving the benefits to which they are entitled."

(B.)

Rules and Regulations of the Land Department.

The rules and regulations of the Land Department relative to Sioux Half-Breed scrip and the location thereof are found in the circulars of the following dates:—

March 21st, 1857, 1 Lester, 627.

Feb. 22nd, 1864, 2 Lester, 307.

Jan. 29th, 1872, 1 Copp's L. L. 723.

May 28th, 1878, 5 C. L. O., 126.

We annex to this brief as Appendices D. and E. respectively, copies of the circulars of March 21st, 1857, and February 22nd, 1864.

The provisions of the circulars of January 29th, 1872, and May 28, 1878, are sufficiently quoted from in the decision of Secretary Vilas in Allen vs. Merrill, 8 L. D. 207.

The circular of 1857 provides, among other things, that the "scrip must be located in the name of the party in whose favor the scrip is issued and the location may be made by him or her in person or by his or her guardian or duly authorized agent."

Attention is called in this circular to the unassignable character of the scrip and that transfers of the same are held void. With reference to the location thereof on unsurveyed lands the circular provides "That when the scrip may be located upon unsurveyed lands * * * * on which the Half-Breed has improvements * * * * * * * his application for location should be accompanied by a diagram and description denoting the natural objects and

distances so as to fix with certainty the exact locality wanted, served as the best notice in our power to settlers that confusion may be avoided and enable him when the public surveys are made, to designate the legal sub-division embracing the location."

The circular of 1864 provides among other things, in addition to the provision quoted by Secretary Vilas in Allen vs. Merrill the following requirement:—

"5th. When not located by the Reservee in proper person the application must be accompanied by the affidavit of the agent, that the Reservee is living and that the location is made for the sole use and benefit of said Reservee."

The form of scrip issued under the act in question was furnished by the Commissioner of the General Land Office (see Report of Commissioner of the General Land Office, November 26th, 1856, Part I., Messages and Documents, 1856-57, page 214). A copy of this form is appended to this brief as Appendix F.

It contains at the very head, the words "NOT TRANSFERABLE OR ASSIGNABLE" and the closing paragraph is as follows:—

"THIS certificate or scrip is not by law transferable and any assignment or conveyance of the same is therefore void."

(C.)

Decisions of the Land Department relating to locations of Sioux Half-Breed Scrip.

These decisions in order of date are:

Felix vs. Carroll, Mch. 27, 1863, unpublished.

Murphy vs. Jones, June 29, 1876, unpublished.

Allen vs. Merrill, Feb. 18, 1889, 8 L. D. 207.

Allen vs. Merrill, on Review, Jan. 28, 1891, 12 L. D. 138.

Hyde vs. Eaton, on Review, Jan. 28, 1891, 12 L. D. 157.

McGregor vs. Quinn, April 5, 1894, 18 L. D. 368.

Strong vs. Pettijohn, Aug. 20, 1895, 21 L. D., 111.

Missoula Elec. Light Co., Oct. 11, 1895, 21 L. D. 306.

John W. Poe, Nov. 16, 1899, 29 L. D. 309.

We annex to this brief as appendices G. H. I. K. and L. respectively, copies of the decisions in Felix vs. Carroll, and Murphy vs. Jones and of so much of the decisions in Allen vs. Merrill, Allen vs. Merrill (on review) and Hyde vs. Eaton (on review), as relates to the scrip locations.

The propositions embodied in these cases are thus stated in various of the Syllabi.

"Sioux Half-Breed scrip is intended by the statute as evidence of a purely personal right in the Half-Breed to locate and receive patent for the number of acres named therein, and cannot be used as a means to secure title to lands except for the sole benefit of the Half-Breed himself.

A location made by one acting in his own interests, and not for the use and benefit of the Half-Breed, is in contravention of the statute under which the scrip is issued.

The right to locate this scrip on unsurveyed land can only be exercised where the Half-Breed has made improvements on such land, and the improve-provements in such case are a condition precedent to the location, and must be made for the use and benefit of the Half-Breed."

"A location of Sioux Half-Breed scrip, made without improvement of the land by or on behalf of the Half-Breed and in the interest of parties to whom the scrip had been assigned by double power of attorney, is invalid."

(D.)

Decisions concerning the Act in question by various courts, including the Supreme Court of the State of Minnesota.

Gilbert vs. Thompson, 14 Minn., 544 (Gil. 414), 1869.

In this case it appears that the United States had patented lands to a certain Half-Breed upon the location of her scrip and the Half-Breed patentee had conveyed the land to two different persons at different times, one conveyance having been made after the patent issued and the other having been made under a power of attorney, executed by the Half-Breed to one Benjamin Lawrence after the scrip issued but before the location thereof. A reference to the paper books and briefs shows that the scrip was located in 1857 upon surveyed land. The plaintiff claimed title from the Half-Breed by virtue of a deed executed by her in 1867 after the patent of the United States to her. The defendant claimed title under a deed executed in pursuance of the power of attorney given by the Half-Breed prior to the location of the scrip and mesne conveyances.

The plaintiff offered to show that the power of attorney under which the defendant claimed was a part of a transaction between the Half-Breed and one Foster whereby by means of two powers of attorney it was sought to evade the provision against the assignment of the scrip and to enable Foster to acquire the scrip for his own benefit.

The first question presented for determination was the character of the right evidenced by the scrip in question. Plaintiff's counsel argued from the language of the act and referred to a decision (not reported) of the Circuit Court of the United States, Mr. Justice Miller presiding, decided

at June Term, 1867, holding, that the right evidenced by the scrip was personal in the one to whom the scrip issued.

Defendant's counsel argued that the clause against the assignability of this scrip (1) did not prohibit the alienation of the land to be acquired therewith or an agreement by the Half-Breed to convey it before location; (2) that the clause in question simply required that the scrip should be located in the name of the Half-Breed; not necessarily for his benefit. That the object of the provision was substantially to save trouble and confusion in the Land Department in the matter of looking into the validity of assignments of the scrip, citing Camp vs. Smith, 2 Minn., 155.

The Court speaking by Mr. Chief Justice Gilfillan, upon this point, says: (The italics being our own.)

> "The Act of Congress of 1854, under which Sioux Half-Breed scrip was issued, provides 'That no transfer or conveyance of any of said certificates or scrip shall be valid.' *It was the intention of Congress that the right to acquire public lands by means of this scrip should be a personal right in the one to whom the scrip issued*, and not property, in the sense of being assignable; but no restraint is imposed upon the right of property in the land *after it is acquired* by location of the scrip. In the scrip itself the Half-Breed had nothing which he could tranfer to another, but his title to the land, *when perfected under it*, was as absolute as though acquired in any other way. It follows that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. *The title to the scrip* would remain in him, and *the title to the land* acquired by it would vest in him just as though no such attmept had been made. Such attempt to transfer would not involve any moral turpitude, nor the breach of any legal duty, as is the case with an attempt to transfer a preemptive right. It would be simply ineffectual because the scrip is not transferrable.

"A power of attorney, so far as intended to "operate as a transfer, would be of no avail; the "right of the Half-Breed in the *scrip and land* "would remain the same; it could not be made *irrevocable, nor create any interest in the attorney.*"

The second question presented for determination was whether the policy of Congress, being as declared, parole evidence, was admissible to show the intent of the parties in executing the powers of attorney, and the court held that such evidence was inadmissible upon the ground that the power to convey "could not be varied by parol proof that the parties had an intention not expressed in it."

In this case it will be noted (1) That a patent had been regularly issued by the Government and the case had passed beyond the jurisdiction of the Land Department of the United States.

(2) That neither the Government nor the Half-Breed was a party to the action and that during the period of ten years intervening between the location of the scrip and the beginning of the action the land in controversy had been in the possession of various persons who had improved the same and was, when the action was begun, in the possession of the defendant who held under a contract of sale from one, Buchard, who had purchased from one, Richards, who had purchased in 1857, by deed executed by Benjamin Lawrence as attorney for the Half-Breed.

As this case will be referred to subsequently in this brief in connection with the decision of the Supreme Court of Minnesota, complained of, we have procured and annexed hereto as Exhibits M. and N. printed copies of the briefs of counsel for the respective parties in the case above cited.

Thompson vs. Myrick, 20 Minn. 205; (Gil. 184;) (1873.)

In this case the contest arose between two parties, one of whom had entered into a contract to cause the conveyance of certain land which was to be located with Sioux Half-Breed scrip to another party, such other party agreeing to pay twenty-eight hundred dollars ($2800.00) for such land and giving his note to the first party at the time the agreement was entered into; the said first party at that time having a power of attorney to locate land for the Half-Breed, owner of the same, located the same and the patent was issued by the United States Government to the Half-Breed. Thereafter such party caused or induced the Half-Breed to convey the land acquired by him under the patent to other persons, among them the wife of such other first party. The action was brought to enforce the performance of the contract to convey the lands.

Neither the Government nor the Half-Breed was a party to the action and the only question was as to the enforceability of the contract. The court refers to and adopts the construction placed upon this act by the Land Department of the United States, citing the circular letter contained in 1 Lester Land Laws, 628, and says:—

> As the scrip was made non-assignable by the Act of Congress, (10 Stat. at Large, 304), and therefore no valid transfer or conveyance of the same could be made, Myrick's relation to the scripees was that of an attorney in fact, duly authorized to locate the scrip for them. So far as the location is concerned, there is no ground for supposing that it was not made prudently, and for the best interests of Myrick's (the attorney's) principals. So far as appears in this case, Myrick's duty in his fiduciary relation to the scrippees was at an end when the location was complete. As this relation was to end upon such location, we can conceive of no reason why Myrick was not at liberty, either before or after the location was made, to enter into an agreement to secure the title (inuring from

the location) to the plaintiff upon payment of an agreed consideration. Such an agreement did not, so far as this case shows, tend to produce a conflict between Myrick's private interest and his duty to locate the scrip to the best advantage of his principals. * * * * * * * * * *

In this case it will be observed that the patent had been issued to the Half-Breed and so far as appears held for the benefit of the Half-Breed who had full control of the land embraced therein and who by his own deed voluntarily conveyed the same after patent issued.

Coursolle vs. Weyerhaeuser, et al., 69 Minnesota, 328, (1897).

This action was brought by a Half-Breed to recover certain land which he claimed he had wrongfully been deprived of by means of the device of two powers of attorney, one to locate and one to convey, against the policy of the Act of Congress, July 17, 1854. It appeared that the Half-Breed had rested quietly for seventeen (17) years or more after location and 10 years or more after patent issued, although with full knowledge of all the facts and of his own acts. The court decided the case upon the ground of laches and estoppel by conduct. In the last paragraph of the syllabus the court says:—

"Facts considered, and held that the plaintiff is estopped by his conduct from asserting that a deed of land entered with his Sioux Half-Breed scrip is void because executed before the land was entered."

The Court says at page 334:—

There is no express finding that the transaction of 1870 was a device to transfer the scrip, although, perhaps, that might be necessarily in-

ferred from the fact actually found. It may also be conceded that, if it was such a device, any deed executed for the purpose of carrying it into effect could be avoided in a proper action for that purpose against any grantee chargeable with notice of the facts * * * * * * * * * *

If the transaction between plaintiff and Dorr in 1870 was a device to effect a transfer of the scrip, there is no finding that defendants had any notice of that fact. * * * * * * * *

Dole vs. Wilson, 20 Minn. 356 (Gil. 308.)

This case while it relates to scrip issued under the seventh clause of paragraph 2 of the Chippewa treaty of September 30, 1854, (10 Stat. 1109), refers to and has a bearing upon the act in question.

The Court says at page 311:—

The complaint stating that the scrip was issued in pursuance of the treaty, it is to be presumed that the entries, which according to the complaint, the parties named in the scrip were thereby authorized to make, were entries of land "to be selected by them," in the language of the seventh sub-division; that is to say, the privilege of each Half-Breed to *select* 80 acres of land was a personal right, and therefore the scrip issued as evidence of the right, was non-assignable. And it was accordingly held by the General Land Office that transfers of the scrip were void, and that a certificate could only be located in the name of the Half-Breed, in whose favor it was issued. 2 Lester, Land Laws, 371-4. But, as held with reference to the Sioux Half-Breed scrip in Gilbert vs. Thompson, 14 Minnesota, 544, (Gil. 414) the transfer of the certificates would not be illegal, but only ineffectual and void, as a transfer of the title to the same. * * * * * * * *

It is possible that the defendant may be able to plead and prove facts, showing that the transactions between plaintiff and defendant were not only evasive, but subversive of the policy of the government, under the treaty before mentioned. Whether such showing would not be overcome by proof of the issue of the patents by the United States, and of the execution of the deeds by the Half-Breeds, is a question which suggests itself, but upon which we express no opinion.

It will thus appear from the Minnesota cases that the policy of the act of Congress has been uniformly recognized, and that there has been no difference of opinion as to the meaning of its language; that a purely personal right in the Indian was intended to be conferred thereby, and that in each and every case the question arose after the issuance of the patent; that neither the Government of the United States, nor, except in the last case where the plaintiff was barred by laches and estoppel, the Half-Breeds were parties to the action, and the validity of the location was not assailed by either of the parties who had any right to assail the same, viz; the Government of the United States or the Half-Breed.

The Court in more than one of these cases referred to the fact that the Government had issued its patent for the land and the question of the validity of the location had been determined by the proper tribunal, viz; the Land Department of the United States, whose adjudication the Court refused to disturb.

But while the court in two of the cases has stated that there was no moral turpitude involved in the attempt merely to assign the scrip, neither this Court nor any other has said that there was no moral turpitude involved in a location which rested upon perjury as the location in this case as a matter of fact did, and as it had to rest in order to be al-

lowed under the rules and regulations of the Land Department, which had been continuously in force since 1864; nor has this court, or any other court, said that a location so made would be valid or not open to question by the United States either before issuance of patent in the Land Department or in the courts upon complaint of the United States even after issuance of patent if meanwhile the land had not gone into the hands of innocent third parties and the fraud had not been discovered until after it had passed beyond the jurisdiction of the Land Department.

We may also refer to two cases, U. S. vs. Chapman, 5 Sawyer, 528, S. C. Fed. cases, 25-407, and Rose vs. Wood & Lumber Co., 73 Cal. 385, touching upon the act in question.

In U. S. versus Chapman, the court says:—

> "The defendant, had attempted to locate the same (Sioux Half-Breed scrip) on this land in 1866 before the United States survey of the land. Inasmuch as the Indian or Half-Breed never lived on the land or resided in the state, the land being then unsurveyed, no such location could then legally be made."

In Rose versus Wood and Lumber Company, the court says at page 388:—

> "In all cases where it has been the intention of Congress to prevent alienation by the beneficiary, such intention has been clearly expressed. Thus the act of Congress of 1854 under which the Sioux Half-Breed scrip was issued, provided expressly that no transfer or conveyance of the certificate should be valid."

(E.)

Decisions of the Supreme Court of the United States.

Felix vs. Patrick, 145, U. S. 317.

In this case the question of the language and policy of the Act of Congress of July 17th, 1854, and the character of the right evidenced by the scrip issued thereunder, was directly considered as the first point in the case.

While the bill contained an allegation of fraud in the matter of acquiring the scrip from the Half-Breed, this point was treated as a matter of minor importance and the court said concerning it "The allegations of the bill do not satisfy us that she did not receive full value for her scrip. * * * * * It is evident that she intended to part with the scrip to some one." And held,

1. That the device of a blank power of attorney and quit-claim deed was doubtless resorted to for the purpose of evading the provision of the act of Congress, that no transfer or conveyance of the scrip issued under said act should be valid.

2. This rendered it necessary that the scrip should be located in the name and for the benefit of the person to whom it was issued.

3. That the scheme was a palpable device to evade the law against the assignment of the scrip.

4. That a person taking these instruments while still in blank was chargeable with notice that they were intended as a device to evade the law against the assignment of the scrip.

5. That such person had no right to locate such scrip for his own benefit.

6. That a trust would be impressed upon lands acquired by making use of facilities intended for the benefit of another.

7. That Congress had recognized the dependent condition of the Indian and their hopeless inability to withstand wiles or cope with the power of the superior race, in various ways, among others in making their scrip non-assignable as in this case.

8. That the defendant bought the scrip and located it in violation of the letter and policy of the law.

In this case the location was made in 1861 upon surveyed land and before the requirement of an affidavit, under the rules of 1864. Patent issued in 1863.

Fee vs. Brown, 162, U. S. 602.

This case, while it related to Chippewa Half-Breed scrip issued under the treaty with the Chippewas of Sept. 30, 1854, (10 Stat. 1109), which provided for the selection of eighty acres of land by the Half-Breed which should be "secured to them by patent in the usual form," is distinctly in point in the present case. There are no express restrictions on alienation of the right, to evidence which, certificates of identity known as Chippewa Half-Breed scrip, were issued. This court held, that the scrip certificates were intended to be located only by the Half-Breed to whom they were issued and patents were to be issued to the persons named in those certificates, and consequently the right to alienate the land was not given until after the issue of the patent.

After adverting at length to the manner of evading the law by means of two blank powers of attorney, the court

says "Of course this scheme was in the nature of a fraud upon the act."

II.

THE LAND DEPARTMENT OF THE UNITED STATES HAD JURISDICTION TO INQUIRE INTO THE MATTER OF ANY FRAUD OR INVALIDITY IN THE LOCATION OF THE SCRIP IN QUESTION, AND A PATENT WAS NECESSARY TO CONVEY THE LEGAL TITLE.

This jurisdiction in the matter of the cancellation of locations of Sioux Half-Breed scrip has been exercised by the Land Department without question ever since the issuance of Sioux Half-Breed scrip. It was recognized and affirmed after full discussion and examination by the Supreme Court of Minnesota in Monette vs. Cratt (1862) 7 Minn 234, (Gil. 176). And the following decisions of the department or of the courts, either direct cancellation of locations of Sioux Half-Breed scrip or refer to and recognize cancellations made by the department.

Allen vs. Merrill, 8 L. D. 207 (on Review) 12 L. D. 138.

Hyde vs. Eaton (on Review), 12 L. D. 157.

Walter Bourke case, 12 L. D. 105.

Cyr vs. Fogarty, 13 L. D. 673.

McGregor vs. Quinn, 18 L. D. 368.

Strong vs. Pettijohn, 21 L. D. 111.

Missoula Elec. Light Co., 21 L. D. 306.

John W. Poe, 29 L. D. 309.

Murphy vs. Jones, decided June 29th, 1876.

Eaton vs. Hyde, decided Feby. 18th, 1889.

John F. McGee, referred to in 14 L. D. 523.

Coursolle vs. Weyerhaeuser, 69 Minn. 328.

U. S. vs. Chapman, 5 Sawyer, 528.

Chapman vs. Pollock, 11 Pac. Rep. 767.

As to the effect of such a long unquestioned exercise of the power, see authorities cited *infra*.

The department has authority at any time before a patent is issued to inquire whether the original entry was in conformity with the act of Congress.

Hawley vs. Diller, 178 U. S. 476.

Orchard vs. Alexander, 157, U. S. 372.

Michigan Land & Lumber Co. vs. Rust, 168 U. S. 589.

Knight vs. United Land Assoc., 142 U. S. 161.

In the latter case the Court say:

"The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the secretary to supervise and control the extensive operations of the Land Department, of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations respecting the public domain, the Secretary of the Interior is the supervising agent of the Government to do justice to all claimants and preserve the rights of the people of the United States. * * * The secretary is the guardian of the people of the

United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case, involving the surveying and disposal of the public lands."

A certificate of location of Sioux Half-Breed scrip conveys at best but an equitable title. A patent is necessary to convey the legal title.

Carter vs. Ruddy, 166 U. S. 493.

III.

THE SUPREME COURT OF MINNESOTA WAS NOT AT LIBERTY TO ENTER UPON THE INTERPRETATION OR CONSTRUCTION OF THE ACT OF JULY 17TH, 1854, AS A NEW QUESTION.

Unless it is clear that the interpretation or construction given to an act by the officers of the Land Department for so long a period is erroneous it cannot be over-turned.

U. S. vs. Johnston, 124 U. S., 236, 253.

U. S. vs. Philbrick, 120 U. S. 52-59.

Hahn vs. U. S., 107 U. S. 406.

Hawley vs. Diller, 178 U. S. 476.

If the act was ambiguous the settled construction given to it from the time of its passage to the present date is conclusive.

Edwards vs. Derby, 12 Wheat. 206.

Brown vs. U. S. 113 U. S. 568.

U. S. vs. Burlington, 98 U. S. 341.

Nat. Bank vs. Whitney, 103 U. S. 99.

U. S. vs. Moore, 95 U. S. 763.

U. S. vs. Alabama R. R., 142 U. S. 621.

McPherson vs. Blecker, 146 U. S. 27.

The uniform decisions of the courts, state and federal, declaring the clear meaning of the language, as well as the policy of the act in question and in entire harmony with the decisions of the Land Department, carry this case in any possible event far beyond the requirements necessary to bring the same within the rules relating to the decisions of the Land Department unsupported by judicial decision.

In the case at bar the Supreme Court of the United States as well as the Supreme Court of Minnesota, in its previous decisions and all other courts, have said that it was clear that the officers of the Land Department were right; the Supreme Court of Minnesota, in the decision complained of, says, refusing to inquire and ignoring authority, that it is clear they were wrong. We think that we may be spared further discussion as to whether the meaning of the language and the policy of the act referred to was an open one for the Minnesota Court.

IV.

THE COURT ERRED IN NOT HOLDING THAT THE FINDINGS OF FACT OF THE SECRETARY OF THE INTERIOR SET FORTH AND EMBODIED IN HIS DECISION OF FEBRUARY 18TH, 1889, WERE FINAL AND CONCLUSIVE.

The trial court as well as the Supreme Court of Minnesota, found or held that Eaton was the duly constituted attorney for the Half-Breed. The Secretary of the Interior

found that Eaton was not the duly constiuted attorney of the Half-Breed or her attorney at all. That the guise of attorney-ship or agency was merely adopted by Eaton for the purpose of evading the provisions of the act of Congress. Whether the question be regarded as one of pure fact or of mixed law and fact, is immaterial. If the question of intention became material in deciding upon the question, the evidence of the intention was before the Secretary in the testimony of Eaton himself to say nothing of the testimony of the other witnesses, and the question of intention is one of fact.

U. S. vs. Quincy, 6 Peters, 446.

The decision of the Land Department upon questions of fact is conclusive.

Catholic Bishop vs. Gibbon, 158 U. S. 155 and cases cited.

The trial court found that all of what may be regarded as the material findings of fact found by the Secretary of the Interior were justified by the evidence before him; but found that in certain specified particulars the facts as found by the Secretary were either not supported by the evidence before him or were otherwise than as found by him. (See statement of case.)

Neither the trial court nor the Supreme Court of Minnesota treat these minor or subordinate matters, which the Court finds were not supported by the evidence before the Secretary, as of any importance in their decisions. The main facts as found, by the Secretary's decision, remain as they must, uncontroverted. We desire to show, however, that even as to these minor or subordinate facts the secretary was warranted in his findings by the evidence before him, and as the Supreme Court of Minnesota has simply found that the findings of the lower court were supported by the evidence before it, we shall find it convenient to dis-

cuss these minor or subordinate findings by means of the assignments of error made in the Supreme Court of Minnesota to the findings of the trial court as shown at page 351 of the record, remarking at the outset that it is difficult to separate some of the so-called findings of fact specified in the assignments of error, from conclusions of law, which the so-called findings specified in the 1st, 2nd, 3rd, 4th and 5th assignments of error, obviously are. Thus the errors in the 1st, 2nd and 3rd assignments of error may be regarded as pure matters of law.

With reference to the fourth assignment of error relating to the finding that there was not when the said scrip was located on said unsurveyed land, nor at any other time, any valid adverse claim to said lands whatever, it has already been shown that the Government at all times had a valid adverse claim to said lands, and with reference to any valid claim of third persons it appears that if no such valid claim existed, it was rendered impossible by the unlawful and forcible possession of said premises by Eaton, until by reason of his procuring the location of the scrip herein by means of a false affidavit he succeeded in segregating the land from the public domain so that no right or entry could attach thereafter. In other words, Eaton with reference to adverse claims of third persons puts himself in the position of taking advantage of his own wrong in order to secure the benefit to himself.

The fifth assignment of error is directed to the reasons as stated by the Court for the decision of the Secretary of February 18, 1889, and the reasons as given by the Court, especially the one assigning the fact, that the Half-Breed had not had personal contact with the land, are so at variance with the letter and spirit of the Secretary's decision, which is made a part of the findings, that we need do no more than refer to it.

With reference to assignment of error five and half the evidence before the Secretary need be but glanced at, to show that his findings in the matter of the improvements made by Eaton's employes upon the premises in question were amply justified; that the so-called house was never intended or fit for human habitation and was abandoned as soon as built, and these facts are entirely in line with the view which the Court takes of the matter as expressed in its memoranda, that it was quite immaterial whether there were any improvements made upon the lands or not.

With reference to the sixth assignment of error, which relates to the finding by the Court that it did not appear by the evidence before the Secretary that the scrip in question had passed through many hands or through any hands before coming in to the hands of said Eaton, it may first be remarked that it is utterly immaterial how many hands the scrip had passed through, the only question being whether the policy of the statute had been evaded by the transfer of the scrip whenever and howsoever made. The Secretary, however, did not make this finding carelessly, for the counsel in their argument before him in the Eaton case had called the attention to the fact that this self same scrip had, prior to the month of October, 1880, been delivered to Lewis Merrill, who, claiming to act as attorney in fact for the scripee, in October of that year, at Miles City, in the then Territory of Montana, filed the same with the United States Land officers and located the same upon certain lands, and that subsequently on the 15th day of May, 1882, Merrill withdrew this scrip from the Land Office at Miles City. All of the files in the Department relating to the scrip were referred to by counsel in their brief and, the Secretary unquestionably examined the same, the facts being undisputed, although these files were not formally introduced in evidence in the Eaton case, the same being matter of record

in the Secretary's own department of which he probably felt he could take judicial notice.

As to the 7th assignment of error, we find nothing in the evidence to sustain the tenth finding of fact that the powers of attorney to said Frank W. Eaton were executed by the said Stram about one week before the location of the said scrip by the said Frank W. Eaton. The testimony of Eaton himself is that he got this scrip from Byron M. Smith of Minneapolis, receiving the same by mail in the latter part of May or the first of June, but this point is immaterial.

With reference to the 8th assignment of error which relates to the fact found that it did not appear from the evidence before the Secretary of the Interior that the said scrippee never saw the lands, it seems to us that the court has allowed itself to fall into a mere verbal criticism of the Secretary's decision, for there was no proof that the Half-Breed ever had in fact seen the land or that she was interested in seeing it or in anything about it. In fact it appears that Eaton himself never even saw the land and did not know whether the Half-Breed had ever done so or not, and the testimony of all of the witnesses who were upon the land say that they had never seen any Half-Breed there. This finding of fact then is as we say a mere verbal criticism of the Secretary's decision, unless the mere circumstance that by some chance or mischance the Half-Breed happened to have been at some time in a position where the land came within the range of her vision affected the merits of this case. The finding is certainly utterly immaterial. Certain it is that the Half-Breed never saw the land in connection with the so-called improvements or the location or in anywise in her own interest. She had in fact no interest in seeing the land, for her interest had been acquired or attempted to be acquired by Eaton, who was the only interested party in the matter.

With reference to the ninth assignment of error, which relates to the fact found by the Court that it did not appear from the evidence that the scripee had sold the scrip long prior to the location thereof, we deem this another instance of a purely verbal criticism of the Secretary's decision and think the point immaterial. The point is whether the Half-Breed had sold the scrip prior to the location, and while as a matter of fact it appeared to the Secretary that she had sold the same long prior to the location, the length of time whether one hour, or ten years is not important.

With reference to the tenth assignment of error, which relates to the fact as found that it did not appear from the evidence before the said Secretary that for a long time the scripee directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatever, we have only to refer to the affidavit made by the Half-Breed filed in the Eaton case in connection with the contest instituted by Hyde and forming a part of the record. This repudiation, however, was a mere circumstance and could not affect the validity of the location if the same was not in fact made for the exclusive use and benefit of the Half-Breed. It would make no difference whether she repudiated or affirmed the act which was invalid at the time of its performance because in contravention of the policy of the law. Public lands cannot be misappropriated by and invalid entry for the benefit of persons not entitled to the same and the same invalidity then be cured or rather effectuated by the means adopted in this case, and in no event could the Half-Breed confer upon others by ratification or otherwise the right to lands to which she herself was not entitled by reason of the fact that the requirements of the law had not been complied with.

It will thus appear that the Secretary's findings of fact upon all material points are fully sustained and the court

expressly so finds. The ultimate fact for the decision of the Secretary was as to whether Eaton's transaction concerning the scrip, taken as a whole, was a device to evade the policy of the act of Congress in question. The Secretary found as a matter of fact that it was. His finding on the matter of fact is conclusive and the court does not seriously attempt to controvert it. The only possible escape then from the action of the Department would be by reason of the fact that there was no such policy of the Act in question. It is upon this proposition alone that the findings and judgment of the court below must and do rest.

V.

IF THE QUESTION WERE A NEW ONE, NEITHER THE SUPREME COURT OF MINNESOTA NOR THIS COURT COULD HOLD OTHERWISE THAN AS THEY HAVE DONE IN THE CASES OF GILBERT VS. THOMPSON AND FELIX VS. PATRICK, RESPECTIVELY, AS TO THE MEANING OF THE LANGUAGE EMPLOYED IN THE ACT IN QUESTION AND THE POLICY OF CONGRESS EVIDENCED THEREBY.

1. The words employed in the act are perfectly clear both as to the clause against the assignment of the scrip "and provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid" and as to the location of the scrip upon any other "unsurveyed lands * * * * * * * upon which they have respectively made improvements." These words are so clear that there is no necessity for construction, the aid of which is invoked only when ambiguity appears.

Lake County vs. Rollins, 130 U. S. 670.

2. If, however, the act needs interpretation that interpretation will be from the words used and the subject-

matter to which it relates, in order to discover the reason as well as the meaning of particular provisions.

McKee vs. U. S., 164 U. S. 293.

Ency. of Law, Vol. 23, page 322, and cases cited.

3. If the act is ambiguous and needs the aid of construction there is not the slightest difficulty in ascertaining the policy which Congress intended to embody in the act, "not by conjecture or roaming at large upon the boundless fields of speculation" but by reference to the report accompanying the bill and the explanation offered of its purposes by the chairman of the committee who presented the bill to the house sitting as a committee of the whole.

We quote from Holy Trinity Church vs. U. S., 143, U. S. 457-463:

> "Again another guide to the meaning of a statute is found in the evil which it is designed to remedy and for this the court properly looks at contemporaneous events, the situation as it existed and as it was pressed upon the attention of the legislative body."

See also,

U. S. vs. Freight Association, 166 U. S. 290, page 358.

Elk vs. Wilkins, 112 U. S. 118.

The amendatory act of May 19th, 1858 (11 Stats. 292) being in *pari materia* may also be referred to.

By the second section of said act it was provided,

> "That the provisions of this act shall not extend to any tract or subdivision, within the body of land aforesaid, which shall have been settled upon in good faith by, and is in the occupancy of, any of the said Half-Breeds or mixed bloods; which lands, so settled upon and occupied by the Half-Breeds, are hereby expressly declared to

be subject to no other disposition than location by the 'certificates or scrip' authorized to be issued by the said act of eighteen hundred and fifty-four, for *the benefit of said Indians.* Nor shall the provisions of this act extend to any lands which may have been located prior to its passage with Half-Breed scrip, with the consent of the settlers thereon."

If Congress contemplated that this scrip was assignable and therefore supposedly floating around the country in the hands of speculators or located elsewhere upon the public lands of the United States, it follows:—That neither the white man nor the Half-Breed could ever get title to the lands so settled upon or in occupancy by any of the said Half-Breeds or mixed bloods upon the ceded territory. If the Indian in occupancy of land upon the reservation had parted with his scrip, which had been located elsewhere, he was without means to acquire title, and if the scrip had been validly located elsewhere it was exhausted. If on the other hand Congress contemplated that any Half-Breed occupying lands upon the reservation had scrip which must belong to him because its ownership could not be parted with, the provisions of this act of May 19th, 1858, were intelligible; otherwise they are not.

Again in Hamilton vs. Rathbun, 175 U. S. 414-419. This court says:—

> "The general rule is perfectly well settled that where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induce the act in question, the mischiefs intended to be remedied, the extraneous circumstances and the purpose intended to be accomplished by it, to determine the proper construction."

Under these rules we may not only interpret the act from the words used and the subject-matter in order to dis-

cover the reason of particular provisions as well as the meaning conveyed by the words used, but if necessary we may go to the legislative history of the act, ascertaining the reasons pressed upon the legislature for the passage of the bill, may consider the evil designed to be remedied, the situation as it existed at the time of the passage of the act and other matters referred to in the foregoing rules.

We shall now consider various other matters having a bearing upon the interpretation of the act in question, if it needs interpretation.

(a). The character of the title conveyed to the United States by the Half-Breed in lieu of which the scrip was issued.

The Half-Breeds occupied the Lake Pepin Reserve under the provisions of Article 9 of the Treaty of July 15, 1830, Vol. 7, Stats., page 330, which is in the following words:— "The Sioux bands in council having earnestly solicited that they might have permission to bestow upon the Half-Breeds of their nation the tract of land within the following limits (describing the same) the United States agree to suffer said Half-Breeds to occupy said tract of country, they holding by the same title and in the same manner that other Indian titles are held."

The Sioux Half-Breeds occupied the Lake Pepin Reserve holding the same as other Indian titles were held, that is to say, in common, the right being one of occupancy merely, which could be conveyed by the Indian to no one but the United States, and which might be disposed of by the United States even without their consent.

Jones vs. Meehan, 175 U. S. 1-8 and cases cited.

U. S. vs. Four Bottles, 90 Fed. 720.

Johnson vs. Mackintosh, 8 Wheaton, 543-604.

U. S. vs. Cook, 19 Wall, 591-594.

Spalding vs. Chandler, 160 U. S., 394-407.

Mo. K. & T. Ry. Co. vs. Roberts, 152 U. S. 114.

All that the Half-Breed conveyed to the United States for the scrip was their Indian title which was extinguished before the scrip was delivered.

(b). The relation which the Indians occupied to the Government of the United States resembles that of guardian and ward. They are in a state of pupilage.

Cherokee Nation vs. State of Ga., 5 Peters 1.

Jones vs. Meehan, 175 U. S. 1.

(c). The general policy of the Government with reference to the Indians, whether of full or mixed blood, has been from the first to render the Indian self-supporting, to induce him to take lands in severalty and to cultivate that land; to make improvements thereon and to protect him in those improvements; to educate him in the arts of civilization and to make at least a herdsman or agriculturist of him as the first step in the civilizing process rendered inevitable by the pressure of the white population upon what was formerly wholly Indian territory, and upon the success or failure of this policy depended the preservation or extinction of the Indian race.

To be more specific let us turn for illustration in support of this proposition in its various branches, to the treaty with the Red Lake and Pembina bands of Chippewa Indians, 13 Statutes, 667-691, referred to and discussed in Jones vs. Meehan, 175 U. S., 1. Article 5 of that treaty reads as follows:

> "To encourage and aid the chiefs of said bands in preserving order and inducing, by their example and advice, the members of their respective bands to adopt the habits and pursuits of civilized life, there shall be paid to each of the said chiefs annually, out of the annuities of the said

bands, a sum not exceeding one hundred and fifty dollars, to be determined by their agents according to their respective merits. And for the better promotion of the above objects a further sum of five hundred dollars shall be paid at the first payment to each of the said chiefs to enable him to build for himself a house."

Article 8, with the Senate amendment thereto, reads as follows:

"In further consideration of the foregoing cession, it is hereby agreed that the United States shall grant each male adult Half-Breed or mixed-blood who is related by blood to the said Chippewas of the Red Lake or Pembina bands, who has adopted the habits and customs of civilized life and who is a citizen of the United States, a homestead of one hundred and sixty acres of land, to be selected at his option, within the limits of the tract of country hereby ceded to the United States, on any land not previously occupied by actual settlers or covered by prior grants, the boundaries thereof to be adjusted in conformity with the lines of the official surveys when the same shall be made, and with the laws and regulations of the United States affecting the location and entry of the same."

"Provided, that no scrip shall be issued under the provisions of this article, and no assignments shall be made of any right, title or interest at law or in equity until a patent shall issue, and no patent shall be issued until due proof of five years' actual residence and cultivation, as required by the act entitled 'An Act to secure homesteads on the public domain.'"

As an illustration of the extreme care exercised by the Government in protecting the Indians in the improvements which they have made upon ceded territory, we may refer to the treaties with the Pillager Chippewas of February,

1855, 10 Statutes, 1156; with the Winnebagoes of February 27th, 1855, 10 Statutes, 1172, each of which contains the provision that "such of the mixed-bloods as are heads of families and now have actual residences and improvements in the ceded country, shall have granted to them in fee, eighty acres of land to include their respective improvements." Substantially the same provision will be found in other treaties wherever there has been any improvement or residence on the part of an Indian, of the whole or mixed blood, in the ceded territory to call for protection. As illustrative of the policy of the Government to encourage the Indian to make improvements and to adopt the habits and customs of civilized life, we need refer to but a few of the many treaties evidencing such intention. Take for instance the treaty of March 15th, 1854, with the Ottoes and Missourias, 10 Statutes, 1038; and with the Omahas, March 16th, 1854, 10 Statutes, 1043; with the Shawnees, May 10th, 1854, 10 Statutes, 1053; with the Dwamish Indians, January 22nd, 1855, 12 Statutes, 1; with the Wahkas, 12 Statutes, 13; Wallawallas, January 9th, 1855, 12 Statutes, 19; the Yakamas, 12 Statutes, 25; and other treaties in said Vol. 12, from pages 31 to 39, all of which Treaties contain a provision substantially that the "President may, from time to time at his discretion, cause the whole of the land herein reserved * * * * to be surveyed off into lots and assigned to such Indian or Indians of said * * * * * tribes as are willing to avail themselves of the privilege and who will locate on the same as a permanent home, for a single person over twenty-one years of age, one-eighth of a section, to each family of two, one-quarter of a section, etc. * * * *." In all cases provision for restriction, in some form, of the right of alienation, is found.

Turn to the treaties with the Saxs and Foxes, of May 18th, 1854, 10 Statutes, 1075, which provide that the "President may assign to each person or family desiring it, such

quantity of land as in his opinion will be sufficient for such person or family with the understanding that he or they will occupy, improve and cultivate the same." The treaty with the Winnebagoes of February 27th, 1855, 10 Statutes, 1172, provides in the 4th Article as follows:

"In order to encourage the Winnebago Indians to engage in agriculture and such other pursuits as will conduce to their well-being and improvement, it is agreed that at such time or times as the President may deem advisable, the land herein provided to be selected for their future home or such portion thereof as may be necessary, shall be surveyed, and the President shall from time to time, as the Indians may desire it, assign to each head of the family or single person over twenty-one years of age, a reasonable quantity of land * * * * * * for their separate use, etc."

As illustrative of the care which Congress has exercised in protecting the Indian in all of his improvements, whether within or without the reservation, we may refer to the treaty with the Shawnees of May 10th, 1854, 10 Statutes, 1053; with the Kaskaskias, May 30th, 1854, 10 Statutes, 1083; with the Wyandottes of January 31st, 1855, 10 Statutes, 1159, all of which contain in some form the provision "each allotment to the Indians in severalty shall be made so as to include the houses, and as far as practicable the other improvements of each person or family.

It will be useless to do more than refer, as we have done, to a few of the treaties illustrative of the general policy of Congress towards the Indians, and when we contemplate further the provisions for the support and maintenance of Indian schools, Indian farms, Indian farmers and various other educational institutions and appliances of civiiization referred to in the various treaties, it seems strange that it should be deemed necessary or advisable by

the counsel for defendants to question the existence of the policy of Congress with reference to Indians, whether of the full or of the mixed-blood. The most that can be said is, that some tribes are further advanced in civilization than others and that the Half-Breeds or mixed-bloods are further on the path of civilization than the full-bloods of their tribe. And it may be that this is in part, at least, owing to the fostering policy of the Government towards them. In some cases the restrictions on alienation are slight; in others they extend absolutely for a period of twenty-five years and at the expiration of such time may even be extended by the president. In other cases the restriction on alienation may be removed when on investigation it is found that the Indian is found competent to manage his own affairs, and in some cases an investigation has been instituted in advance for the purpose of ascertaining who of the Indians or Half-Breeds were competent, and such competency having been ascertained and reported, land has been assigned to them in severalty with absolutely no restrictions on the right of alienation.

Such a case is found in the treaty with the Poncas of March 12, 1858, 12 Statutes, 65, whereby it is provided in Article 3 as follows:

"But to those who have chosen and left the tribe to reside among the whites and follow the pursuits of civilized life, viz., Charles Leclaire, Fort Piere, N. T.; Cillaste Leclaire, Pottowattomie, K. T.; Ciprian Leclaire, St. Louis, Missouri; Julia Harvey, Omaha, N. T.; Jenny Ruleau, Sioux City, Iowa; David Leclaire, Amelia Deloge, and Laura Deloge, at the Omaha mission, there shall be issued scrip for one hundred and sixty acres of land each, which shall be receivable at the United States Land offices in the same manner, and be subject to the same rules and regulations, as military bounty land warrants." Military bounty land warrants were assignable under the provisions of the act of

Congress of 1852. It may be noted in passing that nearly all of the treaties referred to were negotiated on behalf of the Government by George W. Manypenny, the Indian Commissioner, who presented the report in connection with the presentation of the act of July 17, 1854, to Congress.

(d). The policy of the Government with reference to unsurveyed lands.

The only cases in which the Government allowed occupation of unsurveyed lands has been in favor of persons actually settled upon such lands, making permanent and bona fide improvements, residing thereon for a specified length of time and who were under a disability to convey or make any contract to convey any right acquired by virtue of their settlement, and even they could only acquire a conditional or inchoate right. The whole policy of the Government with reference to unsurveyed lands has been to allow no right to be acquired in them except by bona fide settlers, for whose protection and benefit the pre-emption and homestead laws were passed.

The provisions of the homestead law (passed in 1862) did not give the right to settle upon unsurveyed lands until 1880 (Section 3, Act of May 14th, 1880, 21 Stat. 140). Under the provisions of the pre-emption law no general right was recognized in a settler to occupy unsurveyed lands until 1862. At the time of the passage of the act of Congress in 1854 there was no right whatever to settle upon unsurveyed lands by either pre-emptor or homesteader in Minnesota nor anywhere except in California, and even there the act allowing settlement upon such lands was temporary and expressly limited in duration for a short period of one or two years.

See—

Buxton vs. Traver, 130 U. S. 232, at page 235.

Atherton vs. Fowler, 96 U. S. 513, at page 517.

Johnson vs. Towsley, 13 Wal. 72, at page 88.

Webster vs. Luther, 163, U. S. 331.

It will be seen from the foregoing that with reference to unsurveyed lands a highly personal privilege was conferred upon the Indian not at that time existing in favor of white persons, and which has never to the present day been extended to any but bona fide settlers upon the public lands for the purpose of protecting them in their improvements and encouraging them to make homes thereon. And by the act in question the Indian was neither encouraged nor induced to go upon unsurveyed lands but the simple promise was held out to them that should he improve such lands the government would protect him in such improvements by allowing him, but no one else, to acquire the lands so improved.

The two clauses respectively requiring improvements upon unsurveyed lands by the Indian and prohibiting assignment of the scrip reinforce each other if possible and serve to mark the highly personal character of the privilege conferred.

(e). The act considered in the light of extraneous circumstances its words and subject-matter.

One of the first matters in the mind of Congress and one which was being continually called to its attention, was the known improvidence of the Indian and especially with reference to scrip or land warrants of which when issued the Indian was always defrauded.

This is the representation made to Congress by the Secretary of the Interior, December 5th, 1853, at the very session at which the bill in question was passed, and just prior thereto.

We quote from page 61 of part 1 of Messages and Documents, 1853-4:

"The issue of warrants to Indians under the bounty land laws has been suspended; and, unless Congress expressly authorizes it, they will hereafter be disallowed. * * * * They are, moreover, in a state of pupilage; the Government is their guardian and bound to protect them against the superior intelligence and sagacity of the white man. Although many warrants were issued previous to the question being brought to my notice, it may be safely assumed that, with the exception of a few of the Stockbridges, scarcely a solitary entry has been made by an Indian under the scrip, or warrant issued to him. There is no positive proof of the fact; but it is the belief of those who have diligently inquired into it, that wherever scrip or warrants have been issued to individual Indians, they have been defrauded of them. If they are entitled to any such gratuity, sound morality, as well as justice to them, requires that some legal and different provision be made."

We refer also to the circular of instructions issued by the Commissioner of Indian Affairs to agents, of October 2, 1856 (see part 1, Messages and Documents, 1856-7, page 828):

"Sir: For the protection of the rights of Indians, for whom military bounty land warrants have been issued, against improvidence and fraud, the following regulations are prescribed for your Government in all sales and assignments thereof by them within your agency.

"Your certificate of the acknowledgment of any sale or assignment, when made by the person named in the warrant, should set forth that the assignor came personally before you, and was known by you to be the identical person described in the warrant, or that he was made known to you as such by the affidavit of some creditable and disinterested person who is known to you and who has not acted as the agent or attorney of the party, (which affidavit should be returned to this office)

that after having the meaning and purport of the assignment interpreted and fully explained to him, he freely acknowledged the execution of the same, and was satisfied and content with the consideration paid him therefor; and that he made such acknowledgment without the circumvention or undue persuasion of the purchaser or any other person.

The consideration should be paid or delivered in your presence at the time of making the acknowledgment, and the fact so stated, and the amount thereof set forth in your certificate, and that the assignor was capable of managing and taking care of his own affairs; that the consideration paid was a full and fair price for the warrant assigned, and equal to its market value at the time and place of sale; and, generally, that the sale was in all respects just and proper. * * * * * * * * * Many impositions will, it is feared, be attempted to be practiced upon the Indians in connection with their bounty lands, and you cannot exercise too much care in protecting them against such practices."

Considering the act with reference to the words used and the subject-matter to which it relates, we observe that the subject-matter of this act was, as to the thing to be given or issued under it, scrip or a certificate of identity, (the form of which we have annexed to this brief as an appendix), as a means to secure lands to the Indian. The beneficiaries were Indians and one of the classes of lands upon which the scrip might be located, upon certain conditions, was unsurveyed lands. The scrip entitled the person to whom it was issued, (the very object of its issue being to identify the proper claimant) to locate lands. It was a means to acquire lands and without which the land could not be acquired, nor could it be acquired even with the scrip, except upon certain conditions as to unsurveyed lands. All assignments, transfers or conveyances of the same are

expressly made void. As, without the means to locate there could be no location, the scrip, furnishing the sole evidence of the right to locate, being a certificate of identity, the provision against alienation compelled the scrip to remain in the hands of the original holder, the scrip being neither land nor an interest in land, but the mere evidence of a personal privilege to acquire land, which might or might not be exercised.

It was not a grant in *praesenti*. Even after a valid location an equitable title at best was obtained.

The Half-Breeds gave no lands to the United States; they owned none; they relinquished simply their Indian title. The act in question did not effect an exchange of lands. It gave the Indian the means to consummate an exchange of land for his Indian title and simply provided that he should not be deprived of this means. Congress exercised its supervision and duty as guardian up to the time when the exchange was actually effected. As the Indian relinquished his right to the lands in the reservation Congress proposed to see that he got something more than a slip of paper in exchange; to see that he actually got lands which the scrip might entitle him to, as such. It might be that the Half-Breed who followed the wilder portions of his tribe to the west might never use this scrip or need the lands to which he might entitle himself by a proper use thereof, or it might be that after many years and becoming gradually more civilized he might need to avail himself of the provision which Congress by means of this scrip had made for him. By the clause against the assignment of the scrip, thus making the right conferred a purely personal privilege, congress was performing its moral duty by attempting to at least secure to the Indian, lands which might furnish him with a means of subsistence in exchange for his right in the reservation which he had relinquished and also by thus providing a homestead and means of sup-

port through its cultivation, relieving itself of the expense of caring for and maintaining the Indian at the same time that it encouraged him to adopt the habits of civilized life. The necessity of a personal selection by the Indian in the exercise of a personal right evidenced by the scrip involved the choice of a tract of land to be located with the scrip. This involved the exercise of judgment both as to its intrinsic value and its particular adaptation with reference to location and otherwise for his personal use and when it came to the sale of the land he was selling something tangible, with the value of which he might be supposed to be acquainted in a much greater degree than with that of a mere commercial instrument which might be parted with improvidently in accordance with his known traits, for the tithe of its value or a drink of whisky or other similar consideration.

The scrip could be located upon unsurveyed lands by the Indian only in case he had made improvements upon the same. The policy of the Government with reference to unsurveyed lands has been referred to. It is not too much to assert that on the face of the act and without calling in the aid of construction, Congress did not intend to put in the hands of the Indians an instrument which from its experience it knew would be, as was said by Secretary Vilas in his decision in the Merrill case, a mere means whereby speculators would be enabled to acquire unsurveyed lands of the United States and also would not result in conferring upon the Indian the benefit intended.

By giving a certificate of identity with a clause against alienation the case is the same as if land had been given with a restriction on alienation. In such case it could not be successfully contended that although the legal title to the lands could not be parted with the beneficial interest could be transferred by an agreement to convey or other-

wise, which would be given effect after the restriction on alienation had expired or been removed.

Nor is the case different from what it would have been had a promissory note been given to the Indian by the Government in payment for a relinquishment of such title as he had, with a clause against assignment or transferring the same.

In such case we do not believe that it could be successfully urged that this did not prohibit an assignment of the debt evidenced by the note.

The case would not be similar to that of Myers vs. Croft, 13 Wallace 291, which related solely to the law relating to pre-emption rights, providing "that all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void."

The right referred to was the pre-emption right, that is the privilege of purchasing Government lands upon which the pre-emptor had settled, cultivated and improved at the minimum price. There seems to have been a considerable difference of opinion among the various courts in constructing this provision, until it was finally decided by the Supreme Court of the United States in Myers vs. Croft, and they decided it with a view to the policy of the act. They say:

> "Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act and did not go further. * * * This right was valuable and independently of the legislation of Congress assignable. The object of Congress was attained when the pre-emptor went with clean hands to the Land Office and proved up his right and paid the Government for his land. Restriction upon the power of alienation after this would injure the pre-emptor and conserve no important purpose of public policy."

And in Quinby vs. Conlan, 104 U. S., 420, in commenting on this decision the court says:

> "The court held—looking at the purpose of the prohibition—that it did not forbid the sale of the land after the entry was effected, that is after the right to a patent had become vested, but did, applied to all prior transfers. The policy of preventing speculation through the instrumentality of temporary settlers would otherwise be defeated."

The differences between that case and the case at bar will be noted:

1. It applied to white men, *sui juris* and amply competent to take care of themselves.

2. That in construing the provision the court carefully considered the policy of Congress in connection with the language.

3. That in making a distinction between the land and the right secured by the act, the court recognized that the pre-emptor by virtue of his settlement upon the land in question had segregated the same from the public domain and acquired certain inchoate rights to a defined, specific tract of land which when dwelt upon and improved in accordance with the policy of Congress to people its vacant lands, gave him a right to purchase the same. The right as to the particular tract of land after the purchase had been made, was absolute and perfect and could be defeated in no manner whatever; it was a vested right in the land. In the case at bar the Sioux Half-Breed had no right in any land until the scrip was located. After that time, that is after a valid location, and until the patent issue, the Sioux Half-Breed had a vested right in land as such and during this period only, is there any analogy between the right of the Half-Breed and that of the pre-emptor and in all cases where the word land is used, either in decisions of the courts or in the various acts of Congress, the language refers to some

specific tract of land appropriated or segregated or in some manner defined by at least a possessory or inchoate title.

In the case at bar, until the location, the Half-Breed had no possessory title or inchoate title or any title whatever to land as such.

Nor would such cases as Doe vs. Wilson, 64 U. S. 457, and Crews vs. Burcham 66, U. S. 352, which relates solely to grants or reservations in *praesenti* of lands to certain Indian chiefs with no restrictions express or implied upon alienation, have any bearing on this case.

These cases and similar ones are reviewed and their result stated in Jones vs. Meehan, 175 U. S. 1, at page 21 in the following paragraph:—

> "The clear result of this series of decisions is that when the United States in a treaty with an Indian tribe, and as part of the consideration for the cession of the tribe of a tract of country to the United States, make a reservation to a chief or other member of the tribe of a specified number of sections of land, whether already identified, or to be surveyed and located in the future, treaty itself converts the reserved sections into individual property; the reservation, unless accompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple; and that title is alienable by the grantee at his pleasure, unless the United States, by a provision of the treaty, or of an act of Congress have expressly or impliedly prohibited or restricted its alienation."

And in the first paragraph of the syllabus the court thus expresses itself:

> "A good title to parts of the land of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the executive authority of the United States. The question in

every case is whether the terms of the treaty are such as to manifest the intention of the parties to make a present grant to the persons named."

The scrip in question did not evidence a present grant of land and there was an express restriction against alienation.

In a word, under the treaty referred to in Crews vs. Burcham, the Indian had immediately upon the ratification of the treaty and under its terms, a present vested, alienable interest or right in lands. Under the act of July 17th, 1854, the Half-Breed had at best nothing but a right to receive scrip Not until that scrip had been located would there be any analogy between his right and that granted by the treaty with the Pottowamies. Prior to the location of the scrip the right existed only in the form of scrip and bore no analogy to the grant in *praesenti* of a certain number of acres of land thereafter to be selected as under the Pottowamie treaty; for in the latter case the duty of selection was an absolute and merely ministerial one on the part of the Government, which could be enforced against it. The title to the lands granted or reserved was both present and absolute. This was not the condition evidenced by the scrip in question.

Congress too has furnished an illustration how difficult and impossible it is to conceive of an assignment of the evidence of a right without the assignment of the right itself and vice-versa, for it authorizes by the act of January 23, 1832, the issuance of a patent directly to the person to whom the final certificate had been assigned. The practice authorized by this statute would obviously be very inconvenient to the Land Department in compelling it to take cognizance of various transfers of the right to a tract of land between the time of the entry thereof and the issuance of the patent, and the pracitce was sanctioned for but a short time. No such consideration of inconvenience would,

however, prevail in the case of the assignment of a mere certificate or evidence of a right to acquire a tract of public land, for as the possession of the certificate with proper assignments executed in such manner as might be prescribed by rule, would evidence ownership and the absolute right to acquire the lands, it would be both proper and convenient that the Land Department should recognize the ownership of the certificate in the person who presented the same with duly executed assignments thereof.

On the other hand, after allowing the location or entry in pursuance of the right evidenced by such certificate, its duty, except as to the mere ministerial one of issuing the patent conveying a legal title, was at an end. There was neither propriety nor useful purpose to be subserved in requiring the Land Department to keep track of subsequent transfers of the lands or the certificate given upon location or entry, for whatever rights were acquired in the lands subsequently to the entry or location would be a proper matter for the arbitrament of the courts, which could control the legal title evidenced by the patent as the justice and equities of the case might demand. But in the mere matter of taking cognizance of duly executed assignments of the scrip or certificate evidencing the right to appropriate public lands as distinguished from a certificate evidencing its location and ownership, there was no more inconvenience than for a register of deeds to accept and place of record, conveyances executed in accordance of law or for a banker to accept commercial instruments duly assigned or endorsed.

By the clearest possible words Congress evinced its intention that the Indian should remain the absolute owner of the scrip, no transfer or conveyance of the same being valid. This would necessarily include all rights flowing from its possession and use, for a transfer or conveyance is the means by which a title or ownership is divested. The conception of the absolute ownership of the scrip as some-

thing distinct and separate from the right evidenced thereby is an impossible one. That is to say, the conception of an absolute inalienable ownership of the scrip in the Indian and at the same time a beneficial interest or use in some one else necessarily giving him the control of the scrip and of its disposition. If the Indian could part with the beneficial interest in or equitable ownership of the scrip he would cease to be the owner of the scrip itself. He would hold it at most merely as trustee for the beneficial owner who could, if the transaction were valid, compel the Indian to make such use of the scrip as was contemplated by the contract. In advance of location of course the scrip was neither land nor an interest in land. If a third person should desire to acquire a particular piece of land and should agree with the Indian that the Indian should locate this scrip on such land, obviously if the contract were valid a court of equity would compel the Indian to so locate his scrip and to convey the land located therewith to the vendee.

If the Indian should violate the agreement and locate the scrip upon other land then the injured party would have the right, if the contract were valid, to follow the scrip, which by virtue of his agreement had become his property, into the new form of land into which it had been converted.

If a third party contracted with the Indian that he would locate his scrip upon any land which such third party should select and thereafter convey the land to him, if the contract were valid a court of equity upon the selection of such third person of the land desired, would decree the specific performance of the contract and compel the Indian to locate the scrip accordingly. In all of such cases the absolute ownership and control of the scrip would be not in the Indian but in the third person who had contracted for the exercise of the privilege or right evidenced thereby in

his own favor. All such contracts would amount to a transfer or conveyance of this scrip, at least in equity, and either the statute of uses or the doctrines of equity would execute the use or convert the Indian into a trustee for the real beneficiary. There would at least be an equitable assignment, transfer or conveyance of the scrip. The Indian's ownership would cease. When Congress said that no transfer or conveyance of any such certificates or scrip should be valid the language certainly included any transfer whether by way of agreement to use the scrip in a particular manner or the land to be acquired therewith, and whether such transfer or conveyance be legal or equitable in its character or a device in fraud of the act whereby a person appropriates to himself the beneficial ownership of the scrip.

This is a matter neither of strict nor of liberal interpretation. It is the plain import of the language used.

To take the plainest illustration of an attempted separation of the right evidenced by the scrip as something distinct from the scrip itself, which under the act must be and remain the property of the Indian, let us suppose that the Indian either after the passage of the act of 1854 and before the issue of the scrip or after the issue of the scrip should convey to a person by deed of warranty all of his right under the act or all lands that he should thereafter acquire by means of this scrip. This would still leave the Indian free to locate the scrip or not, as he saw fit, and if he ever did locate it, the time when and the lands upon which it should be located would be left entirely to his discretion, whim or caprice. He would not be bound in any relation of agency or trusteeship to locate it for the best interest or in accordance with the wishes of the person who held the deed. The very moment that any condition was imposed as to the time when or the place where the scrip should be located, such condition would operate upon the scrip itself, its ownership, dominion and control, and would

be obnoxious to the clause against the alienation of the scrip.

Of course a court could not compel the Indian to locate the scrip at any time upon any land, or at all, without recognizing the ownership of the scrip itself as such in some one, other than the Indian. It would certainly appear from such considerations that Congress never intended that there should be a right in the Indian prior to location capable of transfer or alienation or apart from the absolute ownership of or dominion over the scrip itself.

Again the consideration of such cases as Crews vs. Burcham, Doe vs. Wilson, and others, reviewed in Jones vs. Meehan, 175 U. S. 1, makes more clear the impossibility of a conception of a right as apart from the scrip which could be the subject of transfer. These cases all related to the effect of a present grant or reservation from the ceded territory in severalty to a chief or other member of the tribe by the very terms of the treaty itself.

In Crews vs. Burcham, referring to such reservation, the court says: that title to no particular land "could vest until the selection by the president and perhaps the issuing of a patent—but the obligation to make the selection and to issue the patent is absolute and imperative. * * * The agreement was one which, if entered into by an individual, a court of Chancery would have enforced by compelling the selection of the lands and a conveyance in favor of the reservee, or in case he had parted with his interest in favor of his grantee, and the obligation is not less imperative and binding because entered into by the Government."

In the case supposed, the Indian could not have been compelled to make any selection or any use of his scrip whatever, nor could the Government have been compelled to select any lands or to give title to any lands without the production and surrender of the scrip and the performance

by the Indian of the conditions imposed by the law, as prerequisite to the location of the scrip.

Again in the case of Crews vs. Burcham as in Doe vs. Wilson, the question arose between two grantees by deed of warranty of the lands or right reserved by the treaty in favor of a chief or member of the tribe; one deed made by the chief in his life-time in advance of the selection or identification of the land reserved to him, the other made by his heirs after the survey and patent. The court held that the title passed by virtue of the first deed.

In the case of Sioux Half-Breed scrip, it is obvious that no right passed to the Indian by virtue of any treaty nor except by virtue of the act of Congress, such right to be exercised in the manner, upon the conditions and by means of the scrip issued under or prescribed by the terms of said act. In advance of the issue of the scrip certainly the Indian had no right under the act of Congress, which he could convey, for the right recognized and provided for in that act, was neither a right in lands or to lands; merely a right after proper identification to receive scrip. This was the only right which the Indian had and of course the only right which he could convey. Certainly the right to receive scrip could not be assigned or transferred.

By virtue of the treaties referred to in the Crews vs. Burcham, and Doe vs. Wilson cases, an absolute alienable estate in fee simple to lands as such, passed at the very moment of the adoption of the treaty.

After the issuance of the scrip, as we have already seen, there was no right apart from or independent of the particular ownership and control of the scrip itself. It would be impossible that the question could have arisen which arose in the two cases last referred to as between an earlier and later grantee of the same right, for in the case supposed, if the Indian had given a warranty deed of his rights under

the scrip or the land that should be acquired therewith, to one person, and then had subsequently after the location of the scrip, given another deed for the land located upon to another person the latter person would necessarily have the title; for in advance of location there would be nothing for the first deed to operate upon.

It could not operate upon lands which were neither granted, reserved nor as to which there was any duty of selection by any person. It could not operate upon any right, because independent of the scrip itself, its possession and ownership, there was no right, and it is obvious that unless it did operate directly upon the scrip itself and effectuated a change of ownership thereof it must be wholly void.

No case can be found, we believe, where the assignment of the evidence of the right is prohibited but that the assignment of the right is also enjoined; the scrip bears no analogy to final receipts issued to pre-emptors or homesteaders. In the latter case the receipt is the evidence that a party has complied with all the requisites of law in order to entitle him to a particular parcel of land and is entitled to the patent of the Government, therefore it will be issued in due course; not so with scrip, which is merely the evidence of a right to acquire land. But even in the case of final receipts, when Congress, provided as it did, by the act of January 23, 1832, (See Camp vs. Smith, 2 Minn., 131) that these final receipts might be assigned, it also evidenced its intention that the receipt should carry all rights evidenced thereby for it was provided that patent should issue to the persons to whom the receipt was assigned, and this, notwithstanding the fact that in such case the receipt was merely the evidence that a person was entitled to a specific tract of land, patent for which would issue to him without the surrender of his receipt, upon the records of the Land Department.

So in all cases of scrip where the right is assignable, the scrip itself is also assignable.

In no instance where the Government has issued land warrants or scrip undoubtedly assignable, as distinguished from certificates or scrip, evidencing a purely personal right, has it ever shrunk from the duty of passing upon the regularity of the assignments, and of issuing the patents to the owner or holder of such scrip by whom it was validly located.

On the contrary, in some instances, such warrants or scrip are in terms declared assignable under rules and regulations to be prescribed by the Commissioner of the General Land office, and others are held to be assignable by reason of the terms of the law authorizing their issue, clearly indicating that they may be located by the person to whom issued, their heirs, legal representatives or assigns.

In the first class are military bounty land warrants, see acts of:

March 22, 1852, 10 Stat., 3.

June 3, 1858, 11 Stat., 209.

Sec. 2414, Rev. Stat.

And the scrip known as "Surveyor Generals" or "Supreme Court Scrip" issued under acts of:

June 22, 1860, 12 Stat., 85.

March 2, 1867, 14 Stat., 544.

June 10, 1872, 17 Stat., 378.

June 28, 1879, 20 Stat., 27.

With respect to these, full and specific regulations concerning assignments were formulated and are being constantly enforced.

1 Lester, 592 and 598.

Circular of Instructions, Feb. 13, 1879.

See also as to Porterfield Scrip, (Copp's 805.)

When it is considered that the issue of bounty land warrants number in the hundred of thousands and more, and of the Supreme Court scrip easily in the thousands, the argument that assignability of the few hundred of pieces of Sioux Half-Breed scrip is restrained solely that the Government may not be under the necessity of ascertaining that its poor, unlettered wards have not been deprived of their property by false, fraudulent and invalid assignments, loses its force.

The simple fact is, and it explains reasonably and easily the provision of the act of July 17, 1854, that all land warrants or scrip issued by the Government evidences a right, in the person to whom issued, to acquire land according to its terms, and when that right is one that may be lawfully transferred, the scrip or warrant may also be, and is transferred, and the location is made by, and patent issued to, the owner thereof. When the right cannot be transferred no lawful transfer of the scrip can be made, and an express prohibition against the transfer or assignment of scrip evidencing the right is necessarily a prohibition of the sale of the right itself. It seems absurd to say that you can sell the right itself, and not the evidence of the right, for one logically goes with the other.

The rule that restrictions upon alienation are strictly construed have no application in this case, for this rule is merely one of construction, the object of which is to ascertain the legislative intent.

If the legislator has not clearly expressed himself in the matter of restriction on alienation, then in obedience to a public policy which in aid of commerce encourages the free transfer of property, the legislator is presumed not to have intended more than he has clearly expressed. But this rule has never been applied otherwise than to ascertaining the legislator's intent in case of ambiguity and

never frustrates that intent when clearly expressed, or permits an evasion of it. But this policy, the freedom of commercial dealing, does not extend to the case of minors or other incompetents.

In the case at bar we have the policy of the legislature expressed in the clearest possible terms in a statute which relates to the property rights of incompetents, persons in a state of ward-ship, the alienation of whose property it has always been the policy of the Government to restrict in a greater or less degree, and while it is always recognized as wise public policy to fetter or hamper as little as possible the free sale and exchange of lands belonging to persons *sui juris*, it would be absurd to attempt to extend this principle of construction to the case of a few ignorant or semi-civilized Indians, wards of the Government, and to make it applicable to the few pieces of scrip evidencing their right to acquire public land.

It is the white speculator who would invoke such a rule for his own benefit; not in the interest of either the Indian or of trade and commerce generally.

VI.

TO ENTITLE EATON AND HIS ASSOCIATES TO RELIEF AGAINST THE PATENT OF THE GOVERNMENT THEY MUST SHOW A BETTER RIGHT TO THE LAND THAN THE PATENTEE, SUCH AS IN LAW SHOULD HAVE BEEN RESPECTED BY THE OFFICERS OF THE LAND DEPARTMENT, AND BEING RESPECTED, WOULD HAVE GIVEN THEM THE PATENT. IT MUST AFFIRMATIVELY APPEAR THAT THEY WERE ENTITLED TO IT AND THAT IN CONSEQUENCE OF THE ERRONEOUS RULING OF THOSE OFFICERS ON THE FACTS EXISTING IT WAS DENIED TO THEM.

Sparks vs. Pierce, 115 U. S., 408-413.

Bohall vs. Dilla, 114 U. S. 47.

Lee vs. Johnson, 116 U. S. 48.

The Half-Breed did not demand the patent; on the contrary she joined as a complainant in the contest against the location of the scrip, and it may be stated as a fact appearing from the records of the Land Department and of the District Court of Ramsey County, Minnesota, that the heirs of Orillie Stram, after the cancellation of the Eaton location brought suit to recover the scrip from the local Land officers at Duluth, and by the judgment of the District Court of Ramsey County, Minnesota, entered February 7th, 1896, obtained possession of said scrip and thereafter caused the same to be located. No. 19 E., on the SE. 1-4 of section 20, township 45, north of range 15 west in Wisconsin, and No. 19 D,. on the S. 1-2 of the SW. 1-4 and the NE. 1-4 of the SW. 1-4 and the NW. 1-4 of the SE. 1-4 of section 27, township 44, range 15 W. in Wisconsin. Of course if Eaton's location was valid when made, no subsequent action of the Government could defeat or affect the same and therefore no attempt was made to introduce in evidence the record of what subsequently became of this scrip. We merely mention this fact in passing.

The character of the whole transaction being made to appear, however, if she had demanded the patent it would have made no difference for it would have been confessedly for the sole benefit of Eaton and to consummate the sale of her scrip that she demanded it, and also as to lands to which, under the terms of the act of Congress she was not entitled.

But it is Eaton and his associates and grantees who demand the patent nominally for the Indian who parted with her interest in the scrip when it was sold. Eaton admits that the scrip was conveyed to him and that the location was for his benefit and the land actually conveyed to

him and his associates practically by himself. The use of the name of the Indian is a confessed sham.

Now if the whole transaction as shown by the evidence before the Land Department upon the hearing, had been presented to the local officers at the time Eaton applied to locate, this would be substantially the representation Eaton would have been compelled to make to them: **"I and my associates and employes desire to acquire a valuable tract of unsurveyed land belonging to the United States. My employes are now in possession of the same under a homestead claim, they to receive a third of the land from me when the title is perfected. They have made some so-called improvements under this homestead claim and have prevented other people settling on this land by armed force under my instructions, in order that I may directly or through my employes secure title to the tract. I have bought from a broker a piece of Sioux Half-Breed Scrip making use of two blank powers of attorney to accomplish the transfer and I desire to use the same to acquire this land for myself. The blank in the power to locate I have filled in in my own name and as soon as you allow the location I will make use of the power to convey by inserting the name of my business partner and have him convey to me and my associates. The Half-Breed had nothing to do with the improvements on this unsurveyed land and knew nothing about them. They were made by my employes under a homestead claim and now that I have the scrip I shall make use of these improvements to locate the scrip, as the act of Congress requires that the Half-Breed shall make improvements upon unsurveyed lands. The improvements were made by me and for my personal use and benefit to enable me to get the land."**

This is the affirmative showing made by Eaton's own case as disclosed by the evidence upon which he claims that the officers of the Land Department erroneously ruled and upon which he claims that it was the duty of the Land Department to have issued the patent of the Government to him.

But while this showing appeared before the Land Department when the testimony was taken and now appears before this court, whose equitable interposition Eaton and his associates and their grantees invoke, it did not appear when Eaton was allowed to make his location and when he produced but one power of attorney, that to locate, accompanied by his affidavit that the improvements were made "under the personal direction of the said Orillie Stram and for her personal use and benefit."

The officers of the Land Department upon this showing should have cancelled Eaton's location in the absence of a contest.

Lee vs. Johnson, 116 U. S. 48.

Knight vs. Association, 142 U. S.

A court upon such a showing, will deny the defendants any equitable relief.

Flournoy Live Stock Assoc. vs. Beck, 65 Fed. Rep. (U. S. C. C. A.) 30.

VII.

THE ERROR OF THE SUPREME COURT OF MINNESOTA IN NOT REVERSING THE JUDGMENT OF THE TRIAL COURT AND DIRECTING JUDGMENT FOR THE PLAINTIFF IN ERROR IS EMPHASIZED BY THE MATTERS APPEARING IN ITS OPINION AND THE REASONING EMPLOYED THEREIN.

Proceeding now to the discussion of the decision of the Supreme Court of Minnesota, we find it difficult to so sep-

arate and analyze the decision as to make it clearly appear what particular portion thereof the court intended to apply to surveyed lands and what particular portion thereof to apply to unsurveyed lands or what portion thereof relates solely to the clause against the assignability of the scrip, and what portion thereof relates to the locations thereof upon unsurveyed lands upon which "they, (the Half-Breeds) have respectively made improvements."

The grounds of the decision are numerous. In short it may be said that every position advanced by counsel for defendants in their argument, and by the court below in its memorandum annexed to its decision, is sustained, and that every position, without exception, taken by the Land Department of the United States, the Supreme Court of Minnesota, in previous decisions, and the Supreme Court of the United States, is over-turned. The decision is therefore the most sweeping and far-reaching that could possibly be rendered, and it convicts not only the Land Department but these courts of error, not merely in one but in all particulars.

The decision does not state in one paragraph or in one place the precise grounds upon which it proceeds. It is diffuse or scattering; it seems to us to confuse or blend the propositions involved in this case with many others in no wise relevant or material.

We shall proceed to collect and present the grounds upon which the decision proceeds and to answer the reasoning of the court in support of its conclusions.

And first of all and lying at the root of the whole matter, the court decides that the scrip in question did not evidence a purely personal right in the Indian. For, if the scrip did evidence such right, it follows as a necessary consequence that that privilege could not be availed of by any means, direct or indirect, whereby any person other than

the Indian could avail himself of it; and that it will be not merely the right but the duty of the Land Department to prevent such a use of the scrip as would amount thus to a misappropriation of the public lands; that is, allowing it to go "to persons not entitled thereto," at the same time that the policy of the law with reference to the protection of the Indian, for whose benefit the scrip was issued, would be frustrated. This is, therefore, a most vital proposition and reaches the heart of the whole matter in so far as the clause against the transfer, or conveyance or assignment of the scrip is concerned. As the court is already in possession of the reasons which induced the passage of the act in question, and various other matters connected with its application by the Land Department and the courts, state and federal, it becomes pertinent at this point to inquire what induced the Supreme Court of Minnesota, in the year 1900, to take a view diametrically opposite to that entertained by the Department and the courts for forty-six years.

The court says, that there are two facts to be borne in mind in determining the correctness of the Secretary's views, as found in his decision of February 18, 1889. The first is, that the law contained a provision that the certificates or scrip should not embrace more than 640 nor less than 40 acres each, and that they were to be apportioned among all of the mixed bloods indiscriminately without reference to age, sex or other conditions, the result being that "old and young adults and minors, male and female, those that had but little Indian blood in their veins and those in whom such blood greatly prevailed, were the recipients."

The second is, that under the law there was issued to each one of 640 persons five pieces of scrip, two for 40 acres each, one for 80 acres and two for 160 acres each, a total of 480 acres, and to each one of 38 persons one piece for 40 acres and two for 160 acres, in all 360 acres to each.

The inference which the court draws from these facts is obviously that the beneficial interest in or ownership of the scrip could be parted with by the Indian. The Court says:—

> "Nor did the law require that the lands on which the scrip was located must be selected by the mixed bloods for personal use, or even that a claim of this kind should be made. In fact, as we have seen, the inference to be drawn from this language and from what was done at and about the time is to the contrary, and the Secretary erred in holding upon the facts as found, that the scripee had no interest whatever in the location made by her attorney in fact. Such a holding is in effect deciding *that every piece of scrip* issued to the mixed bloods, *which cannot be used by the recipients for his or her own personal benefit* and for the acquirement of lands for his or her own personal use, could not be used at all and was of no value."

The explanation of the facts referred to is simple, and was well understood by the Congress which passed the act upon the face of which these facts appear.

With reference to the first fact that the act of Congress provides that the certificates or scrip shall call for not more than 640 acres nor less than 40 acres each, the language is entirely clear but to understand the reason of the provision we have to go to the treaty which led to the passage of the act and the history of the matters connected with the same, all of which will be found collected in Commissioner Manypenny's report accompanying the bill when it was prepsented to Congress, which is submitted herewith as an appendix.

The reason for this provision was in short as follows:— Under the provision of the 10th Article of the Treaty of July 15th, 1830, 7 Statutes, 331, it was provided that the President of the United States might thereafter assign to

any of the said Half-Breeds, to be held by him or them in fee simple any portion of said tract not exceeding a section of 640 acres to each individual. Under the terms of this treaty as construed no Half-Breed could in any possible event be entitled to more than 640 acres of the Reservation, and whether he would be entitled to this or not was solely discretionary with the President. (See Report accompanying Bill.)

It was known that the Lake Pepin Reservation contained something more than 300,000 acres, as a subsequent survey showed, about 320,000 acres. (See Report of Secretary of Interior, Messages and Documents, 1856-7, page 214.) The number of Half-Breeds who would be entitled to participate in the division was not known, but it was supposed to be only about 200. (See Report of Commissioner Manypenny accompanying Bill.) At the time of the passage of the act it was therefore supposed that there would be a large surplus of land in the reservation after satisfying the maximum claim of each Half-Breed for 640 acres. As there had been doubts as to the construction of this treaty Congress provided in the act that the Half-Breeds should relinquish their claim to the Reservation, the especial object of this provision being with reference to the supposed surplus that might exist. As a condition of receiving scrip, therefore the Half-Breeds were required to relinquish their claims to the Reservation. Thus is explained the provision in the act providing that the certificates should contain not more than 640 acres each and the minimum of 40 acres was probably provided out of excess of caution, so that in any event should the number of Half-Breeds prove much greater than supposed, they should, in consideration of the relinquishment of their Indian title, which was all that they had to the reservation, receive not less than 40 acres of land, even should there not be land enough in the reservation to give that amount. For a full

history of this matter, see report of Commissioner Manypenny accompanying bill.

The particular bearing that this provision of the treaty had in the mind of the court upon the clause against the assignability of this scrip is apparent also from the following:

> "There is also another proviso in the act of July 17, 1854, that no transfer or conveyance of any of said certificates or scrip shall be valid. **It is clear** that this **is a positive and emphatic prohibition on the assignability of the certificates or scrip,** but it is not a prohibition of the conveyance of the land upon which the scrip had been located. As was said in Gilbert vs. Thompson, 14 Minn., 544, (Gil. 414.): 'No restraint is imposed upon the right of property in the lands **after it is acquired** by the location of the scrip. In the scrip itself the Half-Breed had nothing which he could transfer to another, but **his** title to the land, **when perfected under it,** was as absolute as though acquired in any other way. It follows that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. The **title to the scrip** would remain in him, and the **title to the land** acquired by it **would vest in him** just as though no such attempt had been made. Such attempt to transfer would not involve any moral turpitude, nor the breach of any legal duty, as is the case with an attempt to transfer a pre-emptive right. It would be simply ineffectual, **because the scrip is not transferable.**' * * * * * The entire purpose of the act itself seems to have been to promote and secure an exchange of the interests of the mixed bloods in the reservation which was becoming valuable for actual settlers for certificates or scrip, which would be available for the acquirement of title in fee to specific parcels of land there or elsewhere on the public domain. It was proposed to compensate the mixed bloods who surrendered their rights or claims under the treaty

in a manner which would be of some value, and it has been held that the fact that the Government saw fit to make the scrip as such, non-assignable, does not operate to prevent the beneficiary from making an agreement before location or giving power to convey the lands when the scrip should have been located and the lands entered."

And the court further says:

> "Nor need we stop to consider why Congress saw fit to declare that the scrip should not be assignable and fail to deprive the scripee of the power of alienation immediately after the location, **and in pursuance of a promise previously made.** It is enough to know that the prohibition related solely to assignment of the scrip itself."

Thus we find that the court takes the bare, bald position upon this proposition, that the language of the clause "provided further that no transfer or conveyance of any of said certificates or scrip shall be valid," did not mean that the right to acquire public lands by means of this scrip should be a personal right in the one to whom the scrip issued. And this is so clear to the court that it says no inquiry is necessary as to the object of the provision, and further says that it "need not cite decisions" in support of this proposition, (that the clause against assignment 'does not operate to prevent the beneficiary from making an agreement before location'),"for they are abundant—federal and state."

We regret that the court did not take time to cite a single decision to this effect, for we feel compelled to say that not only is there no authority to this effect but on the contrary every authority, state and federal, is directly opposed to the statement of the court.

We are utterly amazed at this statement of the court for a variety of reasons: (1.) That for the first time in the forty-six years since the passage of the act has such a sug-

gestion been thrown out by either the Land Department or any court, state or federal, before whom the act in question has come for consideration, and the direct contrary has always been held. (2.) Because in quoting from Gilbert vs. Thompson, the court quotes only that portion of the opinion which, while being against the position assumed by it, throws the least light upon the proposition which it was considering, viz; the clause as to the assignability of the scrip and the character of the right evidenced by such scrip. We shall therefore quote the portion of the opinion which the court omits. The same is as distinct and unequivocal a declaration of the policy of the law of July 17, 1854, as is to be anywhere found. The quotation is as follows: (The black letter being our own.)

Gilfillan, C. J. **"The Act of Congress of 1854, under which Sioux Half-Breed Scrip was issued, provides 'that no transfer or conveyance of any of said certificates or scrip shall be valid.'** It was the intention of Congress that the **right to acquire public lands** by means of this scrip **should be a personal right** in the **one to whom the scrip issued,** and not property in the sense of being assignable. But no restraint is imposed upon the right of property in the lands **after it is acquired** by location of the scrip. * * * * * A power of attorney, so far as intended to operate as a transfer, would be of no avail; the **right** of the Half-Breed in the **scrip** and **land** would remain the same. It could not be made irrevocable nor **create any interest** in the attorney."

When therefore the court tells us that the clause against assignment does not operate to prevent the beneficiary from making an agreement before location, that the decisions, state and federal, to this effect are abundant and then gives only a portion of the decision referred to, we are, as we say, amazed; and especially when we remember that

this decision was rendered in 1869 and that the very position taken by the court in the present case was argued at length before the Supreme Court in the Gilbert vs. Thompson case and then rejected as unsound, and that this fact was called to the attention of the court in this case upon the oral argument.

To prevent any possible misunderstanding we have procured a certified copy of the briefs of the counsel in the Gilbert vs. Thompson case and we submit the same to the court as appendices to this brief.

And yet in this summary manner, without the citation of an authority in support of its position and absolutely ignoring every authority opposed thereto; with absolutely no reason given for its conclusion, (and it says it is unnecessary to inquire for any beyond the language of the act itself) after the forty-six years of uniform, harmonious understanding and attempted enforcement of the law by the Land Department, the Supreme Court of Minnesota and the Supreme Court of the United States, upon the faith whereof property rights have vested, the Supreme Court of Minnesota adopts an entirely new, different, and, as it seems to us, unreasonable interpretation of it, utterly at contrariety with all that had gone before and utterly subversive of the known policy of Congress.

It is not necessary to discuss the further proposition at length "that the clause in question does not operate to prevent the beneficiary from giving power to convey the land when the scrip shall have been located and the lands entered," for we assume that the court must refer to a bona fide power and not one, which operating in connection with a power to convey, was intended to effect a transfer of the scrip, such as, under the decision of the Secretary which the trial court finds was sustained by the evidence before him, was given to Eaton in this case.

The second reason or fact adverted to by the court which seems also to have had very great weight with it, is the fact that five pieces of scrip were issued to each individual, calling in the aggregate for 480 acres.

The act of Congress did not direct this. It was a matter of detail which the Land Department attended to, and it evidently contemplated, and most properly, that the interests of the Indians and the convenience of the Department would be subserved by not requiring the Indian to locate the whole 480 acres in one body.

The situation and necessities of the case forced the Land Department to adopt this course, for some of the Half-Breeds had occupied lands on the reservation and had improvements and homes upon them and were entitled to locate the scrip within the reservation upon these lands to protect them. If an Indian occupied a 40 or 80 acre tract and some other Half-Breed or "other person who had gone into said reservation under authority of law" occupied an adjoining tract, it is obvious that if the scrip were in single 480 acre pieces it could not be located upon a small tract without sacrificing the excess. So too, as there was a large number of Half-Breeds living upon the Reservation, some 200 or more, at least, it may be assumed that many if not all of them had individual houses or improvements upon the reservation, as well as perhaps a considerable number of other people, who had gone into the reservation "by authority of law." It will be seen that the necessity for dividing the scrip into blocks of convenient size, must have at once presented itself to the minds of the Department officers for the reservation was obviously well broken up by numerous homes and improvements upon it. See 1 Lester, 635.

The Land Department did in advance, what if it had not then done it would, in justice to the Indian, have been

compelled to do later at great inconvenience to itself as well as to the Indian.

The court inferentially concludes from this fact (that a number of pieces of scrip were issued to the same individual) that the scrip did not evidence a personal right in the beneficiary or prevent the alienation thereof indirectly of such as he did not desire for his personal use, because the Indian could not be supposed to personally use or occupy a number of distinct tracts of land. But in answer to this it may be said that neither the law of Congress nor the regulations of the Land Department contemplated or required that the Indian should do so. The law did not assume to protect the Indian in the enjoyment of the lands after he got them, to the extent of prohibiting the free alienation thereof. It was the scrip which could not be transferred or assigned. The act in question did not effect the exchange of lands; it gave the Indian the means to consummate an exchange, and simply provided that he should not be deprived of this means. Congress exercised its supervision and duty as guardian up to the time when the exchange was actually effected. As the Indian relinquished his right to lands in the reservation, Congress proposed to see that he got something more than a slip of paper in exchange; to see that he actually got lands, and when the court says: "It was proposed to compensate the mixed bloods who surrendered their rights and claims under the treaty, in a manner which would be of some value," it has unconsciously stated the case with entire correctness, and Congress took the only possible means of making this scrip of any substantial value to the Indian, viz; by seeing or attempting to see to it, that they got what the scrip called for.

But further reference is made to the fact that this scrip was issued to old and young alike, to the decrepit and to the infant and minor.

Now, with reference to surveyed lands, at least, the rules and regulations of the Land Department expressly provide that the location may be made by agent or guardian. When it came to the matter of sale the land would probably be of very much more value to either the infant or the decrepit than the piece of scrip constituting the means by which they were to acquire land and furnishing the evidence that they might entitle themselves to it.

The court proceeds further as follows:

"With these facts before us, can it be urged that Congress thought or intended that these minors would be required by a construction of the law, to personally supervise the selection of from three to five tracts of land on which to locate their pieces of scrip, or that they would have to be directly connected with each of these locations, or, in case unsurveyed lands were desired, they would have to claim the necessary improvements as their own? In other words, do not these facts indicate, to a moral certainty, that it never occurred to the members of Congress that the construction placed on this law by the Secretary would be given to it at any time, much less, after thirty years of a wholly different construction, and a construction also which received judicial recognition and approval? See Gilbert vs. Thompson, Supra; Hope vs. Stone, 10 Minn., 141, (Gil. 114); Marks vs. Dickson, 20 How., 501, 15 L. E. D., 1002. We are confident that they do so indicate and that the requirements found in the circular of May 28, 1878, were not in accordance with the law and were therefore unauthorized. The act itself never required that the improvements should be of a certain kind or value, or that the scripee should be directly connected with the land. It quite conclusively appears to the contrary, when we consider the facts before referred to, unless we take the position that the legislative branch of the general Government intended to confer upon the

mixed bloods, in exchange for their interests in the reservation, scrip which would be of no value unless the recipients made personal selections, were directly connected with *the location and improvements*, and made claim to *both for their own use and benefit.*"

The first proposition then, involved in the above quotation, is that the Indian was not required by the act to personally supervise the selection of the lands, that the improvements were not required to be of a certain kind or value and that the scrippee was not required to be directly connected with the land.

But these are all merely evidential facts and do not reach the root of the matter, viz: The meaning of the language of the act and the policy of Congress.

Another proposition is that the act of Congress did not require in case unsurveyed lands were desired, that the Indians "should have to claim the necessary improvements as their own."

This we accept as expressing the opinion of the court, that the right to locate, with the scrip in question, unsurveyed land, is not subject to the condition that such lands must contain improvements made by the Half-Breed, but that such improvements can be made by anyone and the lands thereupon appropriated by the scrip.

The necessary inference from the language of the court is, that the Half-Breed may sell his right to take lands, evidenced by the scrip issued to him, and that the persons to whom that right is sold may thereupon take unsurveyed lands if he so desires, by making for his own benefit some improvements thereon. This follows from the opinion of the court, that the Half-Breeds are not required to "claim the necessary improvements as their own," or "the location and improvements * * * for their own use and benefit." The argument in this connection is based upon the

proposition that as the scrip was issued to the old and feeble, to the young and weak as well as to the strong it would be of no value to them owing to their inability to make or supervise the making of the required improvements. This necessarily involves the determination that Congress intended to subject to appropriation by means of this scrip the unsurveyed lands of the United States as freely as were subjected the surveyed lands, and is based upon what appears to us to be an entire misconception of the purpose of the act. That purpose was, to permit the location of said scrip upon unsurveyed land only when and in such cases as the Half-Breed to whom it was issued was in possession or occupation of improvements thereon. It was to afford him the means to acquire the lands upon which he had settled and thereby protect him in his ownership and possession. It was not at the date of the passage of the act in question and it is not now, the policy of Congress to authorize the sale or disposal of unsurveyed lands. The instances in which they can be appropriated are few and depend upon special reasons, such as we have just given, with respect to this particular scrip. In 1854 Congress had not generally recognized even the inchoate rights acquired by pre-emption and homestead settlers, which right is defined by this court to be the privilege of acquiring the lands settled upon, in preference to others, should the lands be brought into market for disposal, but as vesting no right in a settler as against the Government itself.

Now as it seems to us, the fact to which the court has adverted, viz., that this scrip in the hands of the aged and youthful would be of no value as to unsurveyed lands unless located by some other person who made the improvements thereon for his own benefit, is directly opposed to the inference which it draws from it. For the Half-Breeds were neither invited nor in any wise induced to settle or make improvements or locate their scrip upon unsurveyed

lands, and Congress certainly never contemplated that the decrepit and the minors at least would do so. There were millions of acres of surveyed lands upon which the scrip could be located without improvements and the locations could be made by guardian or by duly authorized agent. It did not invite or induce the Indian to go upon its unsurveyed lands. It had no object in having him there, but if he did go beyond the limits of the reservation, beyond the confines of civilization, beyond the limits of surveyed territory and did make improvements, Congress as a matter of personal privilege to him, and to protect him in those improvements, gave him the privilege of locating scrip thereon.

The court also, in its reference to the circular of 1878, seems to have forgotten the requirements of the circulars of 1864 and 1872 of which the circular of 1878 is practically a codification or restatement, especially as to unsurveyed lands.

And now we are led to inquire what the court means by its reference in the above quotation to a construction "also which received judicial recognition and approval. See Gilbert vs. Thompson, supra, Hope vs. Stone, 10 Minn. 141, (Gil. 114); Marks vs. Dickson, 20 How. 501, 15 L. E. D., 1002."

It would certainly be remarkable if the very courts which announced and declared the policy of the act in question should sanction and approve of any construction subversive of that policy, and the court is clearly mistaken in its statement; for the act in question has never needed the aid of construction. It has always been placed by the Land Department, as by the courts, in the class where, the intent being plain, nothing was left for construction.

The court does not tell us what the construction is to which it refers. Surely it does not quote Gilbert vs. Thompson as affording "judicial recognition and approval" of the proposition that the location of this scrip, whether upon

surveyed or unsurveyed lands must not be for the benefit of the Indian.

Proceeding to the next authority, Hope vs. Stone, 10 Minn., 141, we find that was a case where one J. C., a Sioux Half-Breed and a beneficiary under the act of Congress in question, living on the Lake Pepin reservation with her husband, in possession of a tract within the Reservation, quit-claimed it to a third party, one S., who quit-claimed to one A. with covenants for further assurance. The Half-Breed quit-claimed to S. in 1853 and prior to the act in question, of July 17th, 1854. In 1857 J. C., the Half-Breed, located her scrip upon this particular tract of land and after the location she and her husband conveyed by warranty deed to S. The question in the case arose between S. and A.; that question being whether by virtue of the warranty deed from the Half-Breed after location to S. his title derived thereby inured, by reason of the covenants, for further assurance, to A. and the court said that it did. In this case as to the location, no question was raised in the Land Department or in the Courts, and the only question decided or referred to that has the slightest bearing on the act, is, that the court decided that the two whites, A. and S., might enter into an agreement, the one to convey to the other, lands when he should acquire title to them, even though the lands at the time might be a part of the public lands of the United States. As before stated the first conveyance by the Half-Breed was in 1853 when she had nothing but the Indian title which never could be conveyed to anyone but the Government. And even if she had made an agreement to convey this land after the passage of the act of July 17th, 1854, as is said by the court in Gilbert vs. Thompson, it "would be simply ineffectual because this scrip is not transferable. The right of the Half-Breed in the scrip and lands would remain the same." We are at a loss to know what the court means by the citation of this authority in this

connection, and what is the construction, and what is the judicial recognition, to which it refers.

Marks vs. Dickson, 20 Howard, 501, is also cited. This case was between two white men and involved the construction of the pre-emption acts of 1830, 1832 and 1834. It seems that two settlers having made a settlement upon the same government sub-division were allowed to make up the deficiency when the matter was adjusted, by what was known as a 'float' or a right to locate lands elsewhere to the extent of the deficiency. One of the parties so entitled to this float sold the same to a third party. The float was subsequently located by a duly constituted attorney in fact, to locate the same and sell the lands acquired thereby, by the original holder of the float, and in pursuance of such authority this attorney conveyed the land to the same person who had previously purchased or attempted to purchase the float.

Subsequently and after the issue of the patent the original holder of the float attempted to convey the same land to another person, and it was between two persons, one claiming under the power of attorney and the other claiming under deed subsequent to patent that the question arose. It was claimed that the power of attorney under which the location was made and the power to sell after location was a mere device to evade the law. After reviewing the history of the legislation thoroughly the court said that as the entry was made under the law of 1834 there was no prohibition against assignment.

With reference to the act of 1838, which did in its policy prohibit any assignment direct or indirect, the court says, "This act (the act of 1838) was preliminary to the allowing of his entry and discloses the policy of Congress, but it has no application in this case as this claim was founded on the act of 1834." The court

further says: "But after the land was entered by Butler he had power to affirm his contract of sale at his option by conveying the land and which sale bound Butler and concludes Marks."

So that in the first place this case has no bearing whatever upon the policy of the act of Congress of July 17th, 1854, or the construction of the same with reference either to the clause against assignability or the right to locate scrip upon unsurveyed lands; second, in the decision there is certainly nothing to indicate that if the law of 1854, under which the entry was made, had contained a prohibition against assignment that the device of two powers of attorney would not be an evasion. In the third place there was no question whatever as to the bona fides of the attorneyship; and in the fourth place, the government had issued its patent for the land and it was beyond the jurisdiction of the Land Department.

We are at loss to know what particular construction or even practice of any kind received judicial "recognition" not to mention judicial "approval," other than the principle that one may lawfully do by attorney what he may lawfully do for himself.

No question of practice was before the court in any of the cases referred to, much less such a practice as was indulged in by Mr. Eaton in this case. And it will be well to notice in this connection that neither in the case of Hope vs. Stone, Gilbert vs. Thompson, nor Marks vs. Dickson, could there possibly have been before the court any question of practice calling for either its "recognition" or "approval," and the reason is that patent had issued, that the suit in each case was between individuals and the Government was not a party. We quote from Lee vs. Johnson, 116 U. S. 48:—

"The patent having been issued by the officers of the Land Department, to whose supervision and control was entrusted the various proceedings required for the alienation of public lands, all reasonable presumptions are indulged in the support of their action. It cannot be attacked collaterally, but only by a direct proceeding instituted by the government or by parties acting under its name and by its authority."

And in U. S. vs. Stone, 2 Wallace, the court says:

"The general public is left to the protection of the Government and its officers, * * * the fraud, if any exists, has been practiced on the government, and as the party injured, it is the appropriate party to assert the remedy or seek relief."

How therefore can it be that with the patent outstanding, which is conclusive proof against collateral attack that all the requirements of law have been complied with and the proper practice, whatever that may be, observed that there could be any question of practice before the court for recognition or approval? The patent on its face and by virtue of its own inherent force, answered such question if any arose as to whether the Government had been defrauded of its land by means of such practice or otherwise.

If the practice in the Land Department was subversive of the rights of the individual then such individual could with propriety question such practice in the courts in an action, not to set aside the patent, but to have the title derived thereunder, held in trust for him; but where the individual must take the position that not he, but the Government has been defrauded, and seek relief upon that ground, it is obvious that it cannot be afforded. We quote from Lee vs. Johnson, supra: "It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government which can file its own bill

when it desires the cancellation of a patent inadvertently or wrongfully issued."

Inquiring further as to what the court means by its reference to "thirty years of a wholly different construction" and referring to the regulations of the Land Department, we find that the earliest circular, that of 1857, not only particularly called attention to the non-assignable character of this scrip "transfers of the same being held void" but authorized no location of the scrip, unless made by the Indian in person or "by his or her guardian or duly authorized agent."

The court certainly upon this circular could not avoid the conclusion that a location by a guardian or agent, by necessary legal implication, must be for the beneficial interest of the ward or principal. And so with the circulars of 1864, 1872 and 1878 which required proof that the location was for the sole benefit of the reservee.

We are therefore left entirely in the dark as to what construction the court refers to as different from the construction given by the Secretary in 1889, and we are in the dark as to where the evidence of this thirty years construction is found.

We must therefore dismiss this branch of the discussion, remarking, however, that the real point, which would be the legitimate subject of inquiry, was, 'what was the policy of the act of Congress as embodied and expressed in the act in question? The only propriety in referring to the rules and regulations of the Land Department would be as an aid in the matter of construction in a case of ambiguity. For if the policy of an act of Congress is clear, and expressed in language not susceptible of more than a single construction, the Land Department could not defeat that policy by refusing or failing to enforce it. Webster vs. Luther, 163 U. S. 331, at page 341.

But the court elsewhere says, that there was a practice "definitely understood." By whom was it understood? Not by the Land Department which adopted the rules and regulations and promulgated the decisions relating to Sioux Half-Breed scrip. No, but to state the case in all of its baldness it was by the speculator, who desired to evade the provision of the law that the practice was "definitely understood." And that practice was to obtain with the scrip two powers of attorney, as in the present case, executed in blank, and the manner of making use of these two powers is described by Secretary Vilas in Allen vs. Merrill, (supra).

And let it be particularly noted, that after 1864, the speculator must file in the Land Office not only the power of attorney and the scrip but the affidavit as required by the regulations.

This definitely understood practice, so-called, was thus a fraudulent practice, not only not sanctioned by the Land Department but in violation of its instructions. The very fact that such evasion was and had to be resorted to was proof positive of the fact that there was no misunderstanding on the part of the Land Department or the speculator or anyone else as to the meaning and policy of the act. We then are left to the bare suggestion that this "definitely understood" practice was so successful an evasion of the law that it was generally, even commonly resorted to and this involves the further suggestion that the Department officials might have been lax in enforcing the law and their own rules and regulations adopted in furtherance of the same. Otherwise, inferentially, the practice could not have been so "definitely understood."

As to the question of fact involved in this inference the remarks of Secretary Vilas in Allen vs. Merrill, may be

referred to and as to the question of law involved therein, we quote from U. S. vs. Minor, 114 U. S. 240:

> "For the truth of these statements, they (officers of the Land Department) are compelled to rely on the oaths of the parties asserting claims, and such *ex parte* affidavits as they may produce.
>
> "In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex-parte*. In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well known that it is reduced to a formula. It is not possible for the officers of the Government, except in a few rare instances, to know anything of the truth or falsehood of these statements. In the cases where there is no contesting claimant there is no adversary proceeding whatever. The United States is passive; it opposes no resistance to the establishment of a claim and makes no issue on the statement of the claimant.
>
> "When, therefore, he succeeds by misrepresentation, by fraudulent practices, aided by perjury, there would seem to be more reason why the United States, as the owner of the land of which it has been defrauded by these means, should have remedy against that fraud—all the remedy which the courts can give—than in the case of a private owner of a few acres of land on whom a like fraud has been practiced."

But if it be assumed for the purpose of argument, that the land officers were not imposed upon and that they knowingly allowed the law and their rules and regulations to be violated, this would make no difference. We quote from Webster vs. Luther, 163 U. S., 331:

"But this court has often said that it will not permit the practice by an executive department to defeat the obvious purpose of a statute."

See also Hewitt vs. Schulz, 21 S. C. Rep. 309.

Proceeding with the opinion, we repeat a part of the quotation above referred to:

"The act itself never required that the improvements should be of a certain kind or value, or that the scrippee should be directly connected with the land."

But as is said by the Supreme Court of Arkansas, in Simpson vs. Robinson, 37 Ark., 137,

"An improvement under our land system does not mean a *general* enhancement of the value of the tract from the occupant's operations. It has a more limited meaning, which has in view the population of our forests and the increase of agricultural products. All works which are directed to the creation of homes for families, or which are substantial steps toward bringing lands into cultivation, have in their result the special character of 'improvements,' and under the land laws of the United States and of the several states, are encouraged. Sometimes their minimum extent is defined as required to convey rights; in other cases not. But the test that runs through all the cases is always this. Are they real and made bona fide in accordance with the policy of the law, or are they only colorable and made for the purpose of fraud and speculation?"

When, therefore, the court says that Congress did not require "that the scripee should be directly connected with the lands" or should claim the same for her personal use and benefit, we ask that with the policy of Congress as it is known to be in this act, why was it not competent for the Land Office to require some reasonable evidence that the Indian did have connection with the improvements and that they were for his or her personal use and benefit? How

could a Half-Breed claim the privileges of this act without being both ready and able to furnish such proof? How could an Indian in good faith locate this scrip upon unsurveyed lands without having improvements made thereon either by himself or under his direction. If the policy of the act is as we have stated, why are the regulations of the Land Office, simply requiring proof that that policy had been observed, unwarranted, and why should the Land Department not be allowed to require evidence that these improvements, however slight their character, were "real and made bona fide in accordance with the policy of the law" instead of being "merely colorable and made for the purpose of fraud and speculation?"

The court further says:

> "No 'improvements' were required where surveyed lands were located and it is very evident that this requirement was for a minor purpose."

But as is said by Secretary Vilas in his decision, in Allen vs. Merrill:

> "This case relates to unsurveyed lands and a further limitation is imposed both to mark and to restrict the personal right of a Half-Breed to take such land? He is required to have made improvements upon it."

Proceeding the court says:

> "We have *discovered* that it was required, not that the improvements upon unsurveyed lands must be of a reliable or permanent character or that they should be made by the scripee or under his personal direction, but that the application should be accompanied by a diagram and description, that the exact locality might be designated and thus in connection with the improvements upon the ground, conflicts might be avoided between claimants and the locations more easily and certainly adjusted when surveys were actually made.
> * * * * * * * * *

The making of improvements by or under the scripee's immediate direction was not made of prime importance by the commissioner when preparing these instructions. The practice and custom of making scrip entries was definitely understood and well settled in the 17 years which followed prior to the issuance of another circular in 1864 emanating from the same office for a like purpose, and from this we have hereinbefore quoted."

The court therefore refers to the period between 1857-1864 (being seven and not seventeen years), and says that the circular of 1857 furnishes the contemporaneous construction of the provision under consideration. Here the court is referring evidently to unsurveyed lands. But it is obvious that there is no difference in the construction of the law as evidenced by the two circulars cited. The latter is more specific than the earlier one, the necessity for the same perhaps being demonstrated by the experience of the Land Department. The earlier circular substantially quotes the provision of the act, that when the scrip may be located upon unsurveyed lands outside of the reservation on which the Half-Breed has improvements the application shall be accompanied by a diagram and description denoting the natural objects and distances so as to fix with certainty the exact locality wanted, and yet in the mind of the court the diagram and description required by regulation of the Land Department was of greater importance than the fact plainly apparent from the circular and its construction relative to applicants to locate lands on which, as required by the act itself, the Half-Breed has improvements. Obviously if the applications were made for unsurveyed lands upon which the Half-Breed did not have improvements, there would be no necessity for the "diagram and description" because if the fact appeared the local officers would be bound to reject it as for a class of lands not subject

to location. The court also refers to the circular of 1864, and says, "In this circular it is stated that where a Half-Breed for himself may make actual settlement his improvements will be notice on the ground to any other settler." From the provisions in these two circulars together, then it is that the court concludes that improvements were required simply as notice to third persons.

Looking at the circular of 1864 we find the heading "Application of Scrip to general localities," and under this head the classification of the lands subject thereto in their order, viz: * * * * "upon any other unsurveyed lands not reserved by Government upon which they have respectively made improvements" * * * * then follow the instructions above quoted. Certainly the language of the circular containing such words and phrases as "the Half-Breed for himself," "actual settlement," "improvements," "any other settler" cannot be cited as meaning that improvements are only necessary for the purpose of giving notice to others of some prior claim and hence are not required at all if perchance no settlers should happen to go in the neighborhood of the lands located. Certainly the court's construction of these two circulars is most unwarranted as well as the conclusion which it draws from them.

Is it possible that Congress intended that this location should be good when made and yet be liable to be defeated at any indefinite period of time thereafter, upon the claim of some settler that he did not have notice; and if such a claim were made would it be a question of actual notice or would the improvements be the only possible means of affording the notice? Suppose that the Half-Breed had the lands staked out and notice of claim posted all over the same, would it still be competent for him to show that the would-be settler had, by these means, actual notice of his claim or must he show improvements no

matter how much actual notice the settler had? The court then has construed this provision not in accordance with its known object, the protection of the Indian or of the Government, but for the benefit of third persons. Why, applying the reasoning of the court as to the provisions against assignability, could Congress not have provided some efficacious and simple mode of giving that notice instead of requiring improvements, which at best, upon unsurveyed lands, would be of a slight and unsatisfactory character. If the object of the provision were notice, suppose that the Half-Breed made improvements, got his location, but allowed the improvements to fall into decay or be destroyed. This might readily be the case, if they were, as the court suggests they might be, under the act, neither of a reliable or permanent character or of a character either to evidence settlement, which the court says is not necessary, nor accompanied by residence or habitation. If the Indian goes upon the ground, not with a view to settlement, residence or cultivation of the land, of what character and how extensive must these improvements be; it being borne in mind that their sole object would be to procure the location of the scrip? Would the clearing of a half acre of land one year, and allowing it to go to waste forever after; the erection of a tepee, such as is used by Indians in their hunting or berry picking trips, with no thought of permanent residence which would be allowed to decay and fall into ruin immediately after the location is made, be sufficient? How efficacious would such means be and what would be the character of the controversies in the Land Office if such issues were to be tried? It is clear that the court has been misled into "roaming at large in the boundless field of speculation" regardless of the explicit language of the act, the known policy of Congress and the most authentic means of discovering what

that policy was, if in the mind of the court there was the slightest ambiguity. We have endeavored to present a few reasons why the conjecture of the court, that the clause requiring improvements on unsurveyed lands was simply a measure of protection to third persons, is untenable. We have already referred to the policy of Congress with reference to these unsurveyed lands and have discussed elsewhere in our brief much that is pertinent here, but at the risk of repetition we shall present a few suggestions in answer to the theory of the court.

Two great distinctions have always been made until recent years, viz., (1) Between offered and unoffered lands, and (2) Between unsurveyed and surveyed lands. It is with the last distinction that we have to deal. In July, 1854, when the act in question was passed, unsurveyed lands were not subject to sale and disposition. They are not so subject today. With the exception of location with a very few classes of scrip, of which this Sioux Half-Breed scrip is one, allowed by Congress in terms to be located upon unsurveyed land, there is no method by which they can be acquired. There is no general law under the provisions of which they can be appropriated. The act providing for the issuance of valentine scrip, April 5th, 1872, 17 Stat. 649, Instructions, Copp 806, which may be located upon surveyed or unsurveyed land, does not require that there should be improvements, upon land of either class located. In the act of June 4, 1897, providing for relinquishments of lands within the limits of Forest Reserves, and the selection of other lands, surveyed or unsurveyed, in lieu thereof, no reference is made to improvements. The exchange of lands provided for in these acts, it will be noted in passing, are of lands held by the beneficiaries in fee simple absolute. The quantities involved, at least under the later act, are many times larger than in the act of 1854. Yet it was not considered necessary, by legislation

or regulation, to require that improvements should be made in order that intending settlers might be warned of possible conflict. At the present time and at the date of the passage of the act relating to Forest Reserves, settlements upon unsurveyed lands are and were freely recognized, to the extent of giving to the settler as against every one but the Government, the preferred right to acquire the land settled upon, if they should thereafter be surveyed and become subject to disposition. At this later time the public lands available to settlement are immeasurably less, and the demand for them many times greater than in 1854, and the danger of conflict proportionately increased, yet no provision is made in either of these acts for giving notice by means of improvements upon the ground for the protection of the intending settler.

It must be then, that Congress in the act of 1854 was designating a class of public land upon which the scrip could be located. It had already designated two classes, viz:—(1) Lands within the reservation not occupied by actual and bona fide settlers, and (2) Any other unoccupied land subject to pre-emption or private sale. The third class is "any other unsurveyed land, not reserved, upon which they have respectively made improvements." This does not confer the power or right to locate the scrip upon any unsurveyed land, but only upon such unsurveyed land as the beneficiaries shall have made improvements upon. The power then was not a general property of the scrip but a right attaching only under certain circumstances and these were the same circumstances that induced Congress to protect the settlements and improvements of settlers who had gone upon the public lands in advance of the surveys, by giving them a preference right to purchase the lands occupied by them, when they should be brought into the market. The purpose of the act therefore must have been to protect such of the Half-Breeds as had left the reserva-

tion and occupied and improved unsurveyed lands by permitting them to use so much of their scrip as might be necessary to acquire the lands occupied by them, the residue, if any, to be located as they might please upon surveyed land subject to pre-emption.

In dismissing this branch of the argument we may remark, that we are surprised that the court with reference to the clause against assignability should tear down the rules and regulations as not being in accordance with the language of the act and yet with reference to the clause as to location upon unsurveyed land turn away from the clear language of the statute to these very rules and regulations to ascertain what the language means.

At this point we may call attention to a further statement in the opinion of the court from which we quote as follows:

> "Nor need we stop to consider why Congress saw fit to declare that the scrip should not be assignable and yet fail to deprive the scripee of the power of alienation after the location and in pursuance of a bargain previously made."

When the court says "yet fail to deprive the scripee of the power of alienation * * * * * * in pursuance of a bargain previously made" it assumes the whole question that is before it for decision, and does so in the face of its own prior decision in the case of Gilbert vs. Thompson, not to mention other cases.

It is not to be expected that Congress after clearly indicating its policy by the clearest and most explicit language should go further and attempt to anticipate and enumerate every particular means or device whereby that policy might be evaded and prohibit resort to them by name. Congress never does this; it is the function of the Land Department to carry out the policy of an act by appropriate rules and regulations suited to the exigencies of the

case, and when the court says that we need not stop to inquire why Congress "failed to deprive the scripee of the power of alienation immediately after the location", we would remark that if it had stopped to inquire, it would have found a conclusive answer to its inquiries not only in much which we have before collected and presented in this brief, but in decisions of its own court, to say nothing of the decisions of the Supreme Court of the United States. We refer to the case of Dole vs. Wilson, 20 Minn., 356 (Gil. 308), which construed a treaty that provided that certain Chippewa Half-Breeds should have the privilege of selecting under the direction of the president each eighty acres of land "which should be secured to them by patent in the usual form." There was no clause restricting alienation of either this right of selection or of the lands after the selection was made. Certificates of identity or scrip were issued, and the court says, with reference to an attempt to assign the same or rights thereunder, "the entries which * * * the parties named in the scrip were thereby authorized to make were entries of lands "to be selected by them" in the language of the seventh sub-division; that is to say, the privilege of each Half-Breed to select eighty acres of land was a personal right, and therefore the scrip, issued as the evidence of the right, was non-assignable. And if we turn to the meaning of the language "to be secured to them by patent" we find that the Supreme Court of the United States in Fee vs. Brown, 162, U. S. 602, holds that as the lands taken under these selections by the Chippewa Half-Breeds "were to be secured to them by parent in the usual form" that the right to alienate the land was not given until after the issue of the patent. In this case the device of the two powers of attorney was resorted to as in the present case.

The answer to the inquiry which the Court says it need not make, is that Congress intended to restrict the highly

personal and very valuable privilege of acquiring lands by means of the scrip to the original beneficiary. It was because Congress desired to make it more valuable to the Indian and of no value to the speculator that the restriction upon alienation was imposed prior to location.

The court also discusses at length, although it says it does not consider it necessary, the point that the adjustment of the location of the scrip in question to the survey operated as a new location upon surveyed lands and holds that it did so operate. The reasoning by which the court arrives at this conclusion seems to us surprising. The moment that the location was allowed the lands became segregated and not subject to entry by any other person. With reference to the rights of individuals, no adverse right of any kind could attach because the lands were segregated. Eaton went to the Land Office after the survey, and asked, as shown by the record and his pleadings, to have the location adjusted to the survey; not to have a new location made as upon surveyed lands. How there could be a more flagrant case of a person taking advantage of his own wrong, we do not see. After holding his fellow citizens off by his wrongful acts as stated, to then be allowed to go to the Land Office after the lands were surveyed, wipe out all that was passed and have the adjustment allowed as a new location because "no valid adverse claim had intervened," when by force and fraud he had prevented any claim of any kind upon the part of an individual intervening, seems to us a remarkable proposition and not at all in accordance with the policy embodied in our public land system or the general principles of law. It is in conflict utterly and entirely with the principle that the title when perfected takes effect by relation as of the date of the initial act. But more than this the valid adverse interests of the United States intervened and of this the court seems to have entirely lost sight. Knight vs. United States Association, 142 U. S., 161.

See also Weeks vs. Bridgman, 159 U. S. 541.

The court further says:

> "It is urged that Eaton's entry amounted to "evasion of that part of the law which forbade "an assignment of the scrip, the well-known rule "being evoked that an act which cannot be done "directly cannot be accomplished indirectly. But "if an agent can be authorized by the scripee to "do all acts that may be necessary as a condition "precedent to a location and may also be author- "ized to carry the scrip to the Land Office and "complete the entry, and this it is well settled, "may be done, why is not the prohibition evaded "quite as completely as the Secretary claimed it "was in this case?"

In this part of the opinion the court proceeds upon the theory that the scrip evidenced a personal right; that agency was necessary to locate the scrip, if the principal did not himself locate it, and upon this theory holds that there was no evasion of the statute by Eaton.

Eaton's agency was certainly a remarkable one. Think of an agency (which involves the element of *delectus personae*) to do such important things as to select land for a principal, to sell that land and account to the principal for the proceeds, being created by an instrument executed in blank, parted with for a consideration and sent broadcast over the country into whose-soever hands it might fall, neither the so-called agent nor the so-called principal ever expecting to see or hear from each other. Think of an agency, which implies compensation from the principal to the agent and doing the best possible for the principal's interest, created by a third person and stranger to the principal, who goes to some other third person or broker, also a stranger, and pays for the privilege of being agent, and for the express purpose of acting solely for his own interests.

In this connection we may note that no where in the opinion or syllabus, is there any statement as to what Eaton did. A stranger to the record is entirely in the dark as to what facts are being passed upon by the court as constituting an evasion or otherwise, and the court instead of meeting the question in Eaton's case, refers to some other case, and without telling us what Eaton did inquires why, if something else could be done, Eaton could not do what he did.

The case assumed by the court with which Eaton's case is compared was that of a bona fide agency; not as in the case at bar, a device to evade the law.

Whatever is done in fraud of law is in violation of it, as evading a statute. Lee vs. Lee, 8 Peters, 44.

In the United States vs. Trinidad Coal & Coking Company, 137 U. S. 160, this court says, "This contention cannot be sustained unless the court lends its aid to make successful a mere device to evade the statute. * * * * There is consequently in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because, if the facts admitted by the demurrer had been set out in the papers filed in the Land Office, the patents sought to be cancelled could not have been issued without violating the statute. The defendant would not have been permitted to do indirectly that which it could not do directly. * * * * It is the case of an association seeking to evade an act of Congress by using, for its own benefit, the names of both its members and employees to obtain from the Government, vacant coal lands which it could not legally obtain upon entries made in its own name."

In Fee vs. Brown, and Felix vs. Patrick, (supra), this court applies the principles enunciated in the above cases,

to the use of two blank powers of attorney, as in the case at bar, and characterizes it as a fraud upon the act, a fraud upon the Indian, a palpable scheme to evade the provisions of the law against the assignment of the scrip, and against the letter and policy of the law.

In this connection the court also says:—

> "Locations under such circumstances have been repeatedly, almost universally upheld."

That is to say, locations by a bona fide agent or one whose faith the Land Department had no cause to suspect. This remark has no bearing on the case at bar.

But further the court says:

> "The officials of the Land Department declaring, however, that the scripee cannot assign the scrip, that location must be in the name of the person to whom the same was issued and that the patent must be so issued, but further holding that as the power to alienate is unrestricted by the law, an agreement to sell is not a matter for determination in the Land Department. It seems very apparent that the effect and validity of such an agreement must be left to the arbitrament of the courts and not to the decisions of the Government officials."

The officials of the Land Department never held that "the power to alienate is unrestricted by law." On the contrary the officials have always held that the power to alienate was so restricted that no possible right could be conferred by such an agreement made before location.

It is probable, as the case of Felix vs. Carroll, decided by the Assistant Secretary of the Interior in 1863, (a copy of the decision in which is appended to this brief), was referred to in the memorandum of the trial court and relied on by the attorneys for the defendants, that the court had

this case in mind as authority for the statement above quoted. No other case was referred to upon this proposition, either by the trial court or upon argument.

This case was so strongly relied upon by the defendant that we have taken the trouble to procure a certified copy of the record from which the following appears:—

The land involved was the north half of the southeast quarter and the southeast quarter of the southeast quarter of section nine, township fifteen north of range thirteen east, Omaha District, Nebraska.

It was located November 21st, 1861, by Sophia Felix with Sioux Half-Breed scrip No. 181 A. and 181 C., issued to her under the act of July 17, 1854. This land had previously been claimed by one Patrick, whose claim was rejected, and also by Carroll, as a pre-emption.

On July 30th, 1862, Patrick's claim was finally rejected by the Secretary of the Interior, who held, that patents for the land should issue to Felix unless her right should be challenged by Carroll. The Commissioner of the General Land Office, carrying into effect the Secretary's said decision, on August 26th, 1862, instructed the land officers at Omaha, Nebraska, to notify all parties interested, of the Secretary's said decision and to inform Mr. Carroll that he had thirty days from date of notification to take such steps as he should be advised, to show the invalidity of the Felix location. Carroll accordingly appeared at the Land Office and, commencing on October 27, 1862, submitted evidence of persons residing in the neighborhood of the claim tending to show that Felix had never resided upon the land. There was no evidence offered to show that the location was not made by her and for her own benefit.

At the request of Carroll's attorney, however, the register reported that (the black letter being our own) "the location in the name of Sophia Felix was not made by said

Sophia Felix in person, but by one Augustus Kountze of Omaha, for the benefit, **as I believe,** of M. T. Patrick."

The Commissioner of the General Land Office on December 15th, 1862, considering the case presented at the trial, decided against the location on two grounds, viz:

1. That at the date of the location Felix was not a resident on the land.

2. That it is "shown by the statement of the Register, "that although the scrip appears to have been located by "said Sophia Felix, yet in fact it was not located by her, "but by one Augustus Kountze, and, **as the Register be-"lieves,** for the use and benefit, not of the Half-Breed, "Sophia Felix, but of M. T. Patrick, a former claimant to "the land."

Upon this record, the Assistant Secretary disposes of the first objection of the Commissioner, upon the ground that, as the land was surveyed, no residence or improvements were required. As to the second objection the Assistant Secretary holds that as Felix had signed the application to locate her scrip and "as the certificate of location "issued in her name, and the patent will issue to her, neith-"er the **Register's report** or the **affidavits** of third parties "can be admitted to establish the interest of any other "person in the location. We could not recognize such inter-"est if an assignment in writing was produced and duly "proved to have been executed by the Half-Breed—whether "she could sell or did sell the land **after** the location of her "scrip, we need not inquire, and the validity and effect of "any **such** sale or assignment must be left to the arbitra-"ment of the courts of law."

This decision of the Assistant Secretary was made after full hearing, upon notice to all parties in interest, and it will be observed that there was nothing in the evidence submitted at the trial to show, or even indicate, that the location of Felix was made in the interest of any third per-

son, and the Secretary merely refused to consider the ex-parte affidavit of Carroll (filed after the trial) and the belief of the Register, which could not properly be considered as showing that such was the fact.

On the facts of this case, as disclosed by the record, it is directly opposed to the statement of the Court. But if anyone could have been misled by this unreported decision (which appears not to have been discovered by the defendants until the hearing on the motion for review before the Secretary in the Eaton case) certainly the circular of the following year (1864) requiring proof that the reservee is living and that the location is made for his sole use and benefit, would remove any misapprehension.

The regulations of the Land Department have all the force of law. Germania Iron Company vs. United States (U. S. C. C. A.) 58 Fed. Rep., 334, at page 336.

The court then proceeds: (The black letter being our own.)

> "It seems very apparent that the effect and validity of **such** an agreement must be left to the arbitrament of the courts and not to the decision of the Government officials."

The court does not tell us whether the agreement it refers to is one made before or after location. If the court means an agreement **before** location we know in advance that the courts would not enforce it. (See Gilbert vs. Thompson, supra, and other cases cited.) And if it refers to an agreement to sell **after** location, it is stating a proposition of law that is not involved in this case, and concerning the soundness of which there has never anywhere been a question.

But it seems apparent that the court's attention is diverted from the real point in this case, to a consideration of the rights of two parties, *sui juris*, as between themselves growing out of a sale or agreement to sell.

In all the cases which have been before the courts patents have been issued and the matter has passed beyond the jurisdiction of the Land Department. The Government has never been a party to any of these actions and where the Half-Breed has been a suitor his right has been recognized as being originally valid but barred because of his own laches.

And note the remarks of the Supreme Court of Minnesota in Dole vs. Wilson, 20 Minn., 313, where the suit was between two white men, one of whom tried to show that the policy of the act of Congress in the matter of the non-assignability of Chippewa Half-Breed scrip had been evaded. The court said:

> "It is possible that the defendant may be able to plead and prove facts, showing that the transactions between plaintiff and defendant were not only evasive, but subversive of the policy of the Government under the treaty before mentioned. **Whether such showing would not be overcome by proof of the issue of the patents by the United States,** is a question which suggests itself."

Does the court mean to hold in one case, it being conceded that there is a particular policy which should be enforced somewhere, that the Land Department cannot inquire into the matter, that it must be left to the courts; and in another case, that the courts cannot inquire into it because the Land Department has investigated and passed upon it, and that that is conclusive?

The language of the United States Circuit Court of Appeals, in Germania Iron Company vs. United States, 58 Fed. Rep. 338, seems appropriate in this connection and we quote it:

"The United States, in disposing of the public "domain through the action of its Land Depart- "ment, cannot be relegated to the position of an "ordinary private vendor of land. As has been "frequently declared in substance, the Government "is clothed with a trust in respect to the pub- "lic domain. It is charged with the duty of pro- "tecting it from trespasses and unlawful appro- "priation, and likewise with the duty of enforcing "the laws, which have from time to time been en- "acted by Congress, describing the terms and con- "ditions upon which individuals may acquire a "title to portions thereof."

The court does not seem to have discussed or more than referred to the question of alleged ratification by the Half-Breed of the acts of Eaton, her so-called attorney. This so-called ratification (evidently procured, as the Secretary states, upon the payment of some consideration just before the hearing) obviously could have no effect in conferring upon Eaton the title to land which the Half-Breed herself did not have or in disposing of the claim of the United States. Moreover the testimony of Eaton himself was, that the so-called ratification was a part of the original scheme. (Record 111-114.)

Further the court says:

"There was no forfeiture of the scrip by the previous attempt to locate. If invalid it was nothing but an attempt."

The Land Department cancelled only the location whereby a misappropriation of public lands and misuse of the scrip were at once prevented, and as hereinbefore stated, the scrip was subsequently taken by the heirs of Orillie Stram and located upon other lands. The action of the

Land Department seems therefore to have been effectual for all purposes.

We dissent from the argument of the court based upon the proposition that if the location of the scrip was invalid "it was nothing but an attempt", for there were present the intention to commit a fraud accompanied by the means of commission. It was actually consummated, and from the date of the location of the scrip, June 16th, 1883, Eaton, his associates or grantees have been, and now are here in court, claiming the benefit of it.

We have now reached that part of the opinion where the court specifies error of the Secretary. It says:

> "Our conclusion is, that upon the facts as found, hereinbefore stated, the Commissioner of the Land Office and the Secretary of the Interior erroneously construed the law and imposed unwarranted conditions. The decision of the latter appears to have been predicated upon a circular of instructions, not upon a statute."

The court has recited, it is true, a part of the decision of the Commissioner of the General Land Office, but it has no where stated the findings of the Secretary of the Interior, or even the ultimate facts found by him. The decision speaks for itself. (Record, p. 63-81.)

In the light of this decision and that in Allen vs. Merrill, 8 L. D. 207, therein referred to, we cannot understand how the court could have arrived at its conclusion.

The court finds that,

"It was error to hold that under the act in question it was vital that the scripee should see the land or improvements prior to the entry and that an agent could not act in her behalf when duly authorized, not only in selecting the land itself but in making such improvements as would in themselves and without regard to their value, be notice on the ground of the assertion of a prior right."

The Secretary did not hold that an agent could not act in behalf of a Half-Breed when duly authorized in selecting land. The rules and regulations of the Land Department provide otherwise and the decision of the Secretary in Allen vs. Merrill, which is made a part of its decision in this case, expressly recognized the right of a Half-Breed to employ an agent to select land.

He **did** find that Eaton was **not** the agent of the Half-Breed, duly authorized or otherwise. In this assignment of error then, we find it again apparently recognized that there must be a bona fide agent duly authorized acting "in her behalf" and all that we can definitely extract from this assignment is first, an utter misconception by the court of the purport of the Secretary's decision, and, second, a holding that the object of improvements upon unsurveyed lands was to give notice to third persons.

The court then proceeds with this statement:

"And if by his decision that the scripee must claim the land for her own personal use the Secretary meant that such claim must be formally made or made in *good faith* or must be established by proof other than or different from that before the Land Department in this particular case, he was in error."

The idea that an asserted claim should not be made in good faith, strikes us as novel. And the further idea that such claim need not "be established by proof other than or different from that before the Land Department in this particular case" when it is remembered that this proof was confessedly false, seems not in harmony with the rules and objects of evidence as generally understood and applied, nor can we see why the court in the light of the decision of Allen vs. Merrill and Hyde vs. Eaton, should have found any difficulty in ascertaining just what the Secretary meant and what the reasons for his decision were.

The court adds:

> "That there was not an intimation in the law that the scripee should personally inspect or select the land or should make in person or even examine the improvements."

The language of the act of Congress was "upon which they have respectively made improvements." And the regulations of the Land Department were merely for the purpose of ascertaining that they and not some speculator had made them.

The court then proceeds with the same argument, that it has before used, as to the scrip being issued to minors and the aged and that it could be of no benefit to them unless they were allowed to dispose of it, and further says: "The Secretary erred in holding upon the facts as found that the scripee had no interest whatever in the location made by her attorney in fact."

In the face of the findings of the Secretary and the evidence before him including that of Eaton himself, we cannot argue this matter. It is not matter for argument.

Before making the last assignment of error the court makes the following ruling. It says: "We hold that on the facts and the law the location in behalf of Mrs. Stram was proper and valid."

It will be borne in mind that the facts have never been stated.

The court treats the entry as that of Mrs. Stram, but it was Eaton's entry and that was the trouble with it.

Finally we reach the last assignment of error. It is to the effect that the title passed out of the United States by virtue of the location, as the act of July 17th, 1854, did not require a patent; consequently the matter passed beyond the jurisdiction of the Land Department, which had no right to assume a supervisory power in the matter.

The grounds upon which the decision of the Supreme Court of Minnesota rests, are then,

First. That the scrip in question did not evidence a personal right in the Half-Breed and that any third person could acquire the beneficial interest evidenced by it.

Second. With reference to unsurveyed lands, that no improvements need be made by the Half-Breed; they need not be made at all, unless as notice to possible settlers on the same tract; that in any event they could be made by a third person who had purchased the scrip, for his own benefit and as a means to procure the location of the same.

Third. That the adjustment of the location to the lines of the Government survey, operated as a location *de novo*, as of surveyed lands, and thus, in any event, rendered improvements unnecessary.

Fourth. That both in the matter of making improvements and the location of the scrip, Eaton was the duly constituted agent of the Half-Breed and was acting for her benefit; and that thus the prohibition against the assignment of the scrip was not violated.

Fifth. That the procurement and use of two blank powers of attorney in connection with the scrip, as in the case at bar, did not constitute an evasion of the statute.

Sixth. That it mattered not, in any event, how fraudulent Eaton's location might in fact have been; the Land Department had no jurisdiction to inquire into it, or to cancel the location, because the title had passed out of the Government upon the location, no patent being necessary.

We feel at liberty to say, that if the court had prepared a syllabus as prescribed by Section 4826 of the Revised Statutes of Minnesota, embodying the principles settled by its decision, that the conflict between the principles therein announced, and the authorities to which we have referred, would have been apparent even to those unfamiliar with the record.

It also seems apparent (unless our conception of the purport and effect of the authorities which we have cited to the various propositions discussed, is utterly erroneous) that the decision complained of, is most serious and far reaching in its effects.

The case at bar involved what the Supreme Court of Minnesota upon the oral argument appropriately characterized as "vast interests." But we think that beyond this, all titles depending upon patents from the United States Government, (the "immense importance and necessity of the stability" of which, is adverted to in the Maxwell land

grant case, 121 U. S. 325, and other cases in this court), as well as titles dependent upon the principle of *stare decisis*, are involved in the present case.

The argument *ab inconvenienti* of the trial court, (set forth in its memorandum at the bottom of page 299 of the record) where reference is made to many patent titles having been secured by means of Sioux Half-Breed scrip, which would be jeopardized if the action of the Land Department in this case were upheld, and which may have influenced the Supreme Court of Minnesota, does not appeal to us. We suppose that many thousands of so-called titles have been overthrown by the Land Department in the exercise of its jurisdiction prior to issuance of patents, in the matter of cancelling fraudulent, or invalid entries upon the public lands. The result of the decision complained of would be, in principle at least, to reinstate thousands of these cancelled entries and render a patent title from the United States Government absolutely unreliable and untrustworthy. But even if the Court's premise be true, as we hope it is not, that the act of Congress in question had been uniformly and successfully evaded (which evasion was in violation of the regulations of the Land Department and with the aid necessarily, since 1864, at least of perjury), we think that its fears as to titles resting upon patents in the hands of bona fide holders, are groundless. Except by the Government, the Half-Breed or a person claiming prior equities, the title is and always has been impregnable to attack. If after the patent issues, suit be brought by the Half-Breed he is bound by the same rules of law with reference to estoppel, laches, limitation and bona fide purchasers as any other litigant, as witness the cases of Coursolle vs. Weyerhaeuser and Felix vs. Patrick, supra.

If the Goverment is to be the party complaining, after the issuance of patent, it can bring no suit to set aside any

patent issued prior to 1891, unless the suit be brought within five years from March 3rd, 1891, and it can bring no suit to set aside any patent issued after that date or thereafter to be issued, unless the suit is brought within six years from the issuance of the patent (Act of March 3rd, 1891, 26 Statutes, pages 1095-1099, amending Section 2301 of the Revised Statutes.

In no event can the Government set aside a patent when the lands have gone into the hands of a bona fide purchaser for value. Col. Coal Co. vs. U. S., 123 U. S., 307.

There are doubtless very many cases of cancellation of locations of Sioux Half-Breed scrip the decisions in which are not published because the cases have not gone on appeal or otherwise to the Secretary of the Interior.

But after all, the argument of the trial court is directed necessarily, only to the question of how long, and to what extent must a fraud be successfully perpetrated, to establish it as legal, preclude inquiry even though it is still *in fieri*, and secure to the wrongdoer the fruits of its consummation.

The plaintiff in error bought the lands in controversy from the patentee of the Government, and it is the title thus derived, which by the judgment complained of, is decreed to be held in trust for Eaton, his associates and grantees, under their claim of a successful evasion of the statute.

The fact that four of the five justices of the Supreme Court of Minnesota (Mr. Justice Lewis not sitting because he had been of counsel in the case) concurred in the opinion, does not shake our conviction as to the error of the court. The decision seems to be out of harmony with the general principles of law and equity and in it's immediate results as well as the logical conclusions flowing from it, to render

property rights insecure, and we have felt at liberty to analyze and discuss the decision in question with the same freedom as though it had not been rendered in this case.

We respectfully submit that the plaintiff in error is entitled to the relief demanded in it's complaint and that the judgment of the Supreme Court of Minnesota should be reversed.

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Of Counsel.

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APPENDIX.

APPENDIX A.

(10 Stat. 304.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the President be, and he is hereby, authorized, to exchange with the Half-Breeds or mixed bloods of the Dacotah or Sioux nation of Indians, who are entitled to an interest therein, for the tract of land lying on the West side of Lake Pepin and the Mississippi River, in the Territory of Minnesota, which was set apart and granted for their use and benefit, by the Ninth article of the Treaty of Pririe du Chien, on the 15th day of July, One Thousand Eight Hundred and Thirty; and for that purpose he is hereby authorized to cause to be issued to said persons, on the execution by them, or by the legal representatives of such as may be minors, of a full and complete relinquishment by them to the United States of all their right, title and interest, according to such form as shall be prescribed by the Commissioner of the General Land Office, in and to said tract of land or reservation, certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation pro rata among the claimants—which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual and bona fide settlers of the Half-Breeds or mixed-bloods, or such other persons as have gone into said territory by authority of law, or upon any other unoccu-

pied lands subject to pre-emption or private sale, or upon and other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements: Provided, that said certificates or scrip shall not embrace more than six hundred and forty, nor less than forty acres each, and provided that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation: And provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid.

Sec. 2. And be it further enacted, that the President be, and he is hereby authorized, to cause to be ascertained the number and names of the Half-Breeds or mixed-bloods, who are entitled to participate in the benefits of said grant or reservation as aforesaid, before the issue of the certificates or scrip provided for in the preceding section.

Sec. 3. And be it further enacted, that from and after the passage of this act, the President is authorized to have the lands within the said reserve surveyed, and exposed to public sale at the Land Offices for the districts in which said lands may lie, according to the boundaries of the several land districts recently established by Congress, in the same manner as other public lands.

Approved July 17, 1854.

APPENDIX B.

(11 Stat. 292.)

An act to amend an act entitled "An Act to authorize the President of the United States to cause to be surveyed the tract of land, in the Territory of Minnesota, belonging to the Half-Breeds or mixed-bloods of the Dacotah or Sioux nation of Indians, and for other purposes," approved seventeenth July, eighteen hundred and fifty-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the act approved seventeenth July, eighteen hundred and fifty-four, above referred to, chapter eighty-three, be, and the same is hereby, amended, so that the body of land known as the Half-Breed tract, lying on the west side of Lake Pepin and the Mississippi River, in the Territory of Minnesota, and which is authorized to be surveyed by the said act of eighteen hundred and fifty-four, shall be subject to the operation of the laws regulating the sale and disposition of the public lands; and settlements heretofore made thereon are declared valid so far as they do not conflict with settlements made by Half-Breeds, and that the settlers shall have the benefit of the pre-emption laws of the United States, any location of Half-Breed scrip thereon, after the date of settlement, notwithstanding; Provided, The declaration of pre-emption be filed within three months after public notice is given of the passage of this act in proper land district; And provided, That when two or more persons have settled on the same quarter section, prior to the passage of this act, they shall be permitted to enter the same, and the rights of each shall be determined according to the provisions of the act relating to pre-emptions, passed March third, eighteen hundred and forty-three.

Sec. 2. And be it further enacted, That the provisions of this act shall not extend to any tract or subdivision, within the body of land aforesaid, which shall have been settled upon in good faith by, and is in the occupancy of, any of the said Half-Breeds or mixed-bloods; which lands, so settled upon and occupied by the Half-Breeds, are hereby expressly declared to be subject to no other disposition than location by the "certificates or scrip" authorized to be issued by the said act of eighteen hundred and fifty-four, for the benefit of said Indians. Nor shall the provisions of this act extend to any lands which may have been located prior to its passage with Half-Breed scrip, with the consent of the settlers thereon.

Approved, May 19, 1858.

APPENDIX C.

33d Congress, 1st Session. — Ho. of Reps.

REP. NO. 138.

SIOUX LANDS OR RESERVATION IN MINNESOTA TERRITORY.

(To accompany bill H. R. No. 338.)

APRIL 28, 1854.

MR. DANIEL B. WRIGHT, from the Committee on Indian Affairs, made the following

REPORT.

The Committee on Indian Affairs, to whom was referred the memorial of the Sioux Half-Breeds, having considered the same, beg leave to report:

That under the treaty of Prairie du Chien, of date July 15, 1830, and the ninth article of said treaty, it was stipulated and agreed between the United States and the Sioux bands of Indians, that said Indians might have permission to bestow upon the Half-Breeds of their nation the tract of land within the following limits, to-wit: "Beginning at a place called the Barn, below and near the village of Red Wing chief, and running back fifteen miles; thence in a parallel line with Lake Pepin and the Mississippi about thirty-two miles, to a point opposite O'Boeuf river; thence fifteen miles to the grand encampment opposite the river aforesaid"—the United States agreeing to suffer said Half-Breeds to occupy said tract of country; they holding by the same title and in the same manner that other Indian titles are held.

And in the tenth article of said treaty it was further agreed that the President of the United States might thereafter assign to any of the said Half-Breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section of six hundred and forty acres to each individual.

Said tract of country thus assigned to said Half-Breeds lies in the southern part of the Territory of Minnesota, on the western side, and at the head of navigation of the Mississippi river; it contains, by estimation, three hundred thousand acres, and includes within its limits some of the most fertile lands in the Territory of Minnesota.

The Indian titles to the whole of the country surrounding said reservation are now extinguished, and the bands to which said surrounding country belonged have removed westward, and many of the less cultivated of said Half Breeds are desirous of disposing of their interests in said reserve and following their Indian relatives. Some have already gone. Justice, humanity, and sound policy alike second their desire; for all experience demonstrates the utter incompatibility of the uncivilized Indian with civilized life. Many of them, however, are represented as being educated, and having judgment and experience sufficient to take care of their own interest. A number of them are said to be men of much intelligence, possessing property, and having become citizens of Minnesota and of the adjoining States. Some of them have served in the legislature, and filled offices of honor and trust in the Territory, while others are engaged in agriculture, mercantile and other profitable pursuits. With them, at least, the object of the fostering policy of the Government has been attained, in fitting them for civilized life; for, in point of intelligence and civilization, many of them would compare favorably with their white brethren.

The term "Half-Breed," as applied by some to them, is a misnomer, for it was intended to include all those having an admixture of white and Indian blood in their veins, in whatsoever degree.

The actual title of those persons to the reservation in question is that of Indians, although many of them have a preponderance of white blood. The title of the Indians must be considered with reference to their mode or habit of life. Their hunting-grounds are as much in their possession as are the cleared fields of the whites, and their undisputed right to exclusive enjoyment beyond dispute. Yet this is a right to possess or hold their lands as joint tenants, or as tenants in common; and no one of such community can dispose of an integral part of their common property, nor is any white citizen authorized to settle upon the same.

The laws and treaties of the United States contemplate the Indian Territory as completely separated from that of the States, and provide that all intercourse with them shall be carried on exclusively by the Government of the Union; hence the importance to the inhabitants of the Territory of Minnesota, that said reservation should be held in severalty by said Half-Breeds, with title in fee, or by their assignees, as citizens of the United States; for, under existing circumstances, they are deprived of the right of way for thirty-two miles on the Mississippi river—the natural outlet for their produce and commerce. Having no right to open roads through said reservation, the citizens of Minnesota are precluded the use of those natural advantages to which their position entitles them.

Said Half-Breeds have repeatedly applied to the Government of the United States to have their lands allotted to them in fee, as stipulated in the tenth article of said treaty; but the President has hitherto wholly failed to assign to said Half-Breeds their lands in fee, upon the ground,

as your committee is informed, that there was no stipulation in said treaty as to whether the said Half-Breeds should incur the expense of such allotment. Said Half-Breeds, in 1851, offered to take one hundred and fifty thousand dollars ($150,000) for their said reservation; but not being a tribe or nation in the legal sense of the term, they had no power to treat, and the proposition was rejected by the Senate of the United States; nor can their Sioux relatives treat for their Half-Breeds in relation to said reservation since they have parted with all the title they held to the same.

Said Half-Breeds, holding by the uncertain and precarious tenure of Indian title, have no inducement to improve their homes in said reservation; and thus the fairest portion of Minnesota bids fair to remain a desert, unless the stipulations of the treaty can be carried into effect.

Justice and sound policy alike require that this should be done. They look to our Government for protection, rely upon its kindness, invoke its humanity, and appeal to its power for relief.

Your committee having carefully considered the premises, and believing that the relief sought ought to be granted, report herewith a bill, which they think will attain the end desired, and recommend its passage.

DEPARTMENT OF THE INTERIOR.

Office Indian Affairs, March 4, 1854.

Sir: The 9th article of the treaty of the 15th of July, 1830, with the Sacs and Foxes, and certain tribes of the Sioux, &c., and which treaty was ratified on the 24th of February, 1831, is in the following words:

"Art. 9. The Sioux bands in council having earnestly solicited that they might have permission to bestow upon the Half-Breeds of their nation the tracts of land within

the following limits, to-wit: Beginning at a place called the Barn, below and near the village of the Red Wing chief, and running back fifteen miles; thence in a parallel line with Lake Pepin and the Mississippi, about thirty miles, to a point opposite Beef or O'Boeuf river; thence fifteen miles to the Grand Encampment opposite the river aforesaid,—the United States agree to suffer said Half-Breeds to occupy the said tract of country, they holding by the same title and in the same manner that other Indian titles are held."

The 10th article, after designating lands for the Half-Breeds of other tribes, parties to the treaty, contains the following proviso in respect to the various grants made:

"The President of the United States may hereafter assign to any of the said Half-Breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section of six hundred and forty acres to each individual, And this provision shall extend to the cession made by the Sioux in the preceding article."

The object of setting apart the individaul reserves above referred to for the Half-Breed Sioux, has, from the year 1836 until the present time, given rise to an extended correspondence between the Indian Department and the agents, attorneys, and friends, of the parties interested; but so far, to all appearance, the questions connected therewith are now as far from being settled as they were when first brought to the notice of the Indian Office.

In a letter dated the 25th of July, 1836, Lawrence Taliaferro, Esq., the then Indian agent at St. Peters, informed this office that the names of sixty-four Half-Breeds had been deposited with him, who stood prepared either to cede to the United States their reserve on Lake Pepin, or to receive a confirmation of title to the same, and a fair division among those entitled, under the provisions of the treaty of 1830. "This precautionary measure," he was requested to say, "had been adopted by the more intelligent half-breeds,

in consequence of learning that an attempt is about being made by one portion (a minority) of the claimants to defraud the majority out of their just proportion of the lands under said treaty, under the influence of certain white speculators."

On the 3d of March, 1837, an act of Congress was passed appropriating $1,000 to carry into effect the provisions of the 9th and 10th articles of the treaty of 1830; but the money does not appear to have been drawn from the treasury, for the reason stated by Commissioner Crawford in his report of the 7th of January, 1840, to Secretary Poinsett, that it could not be applied, without legislative authority, beyond running the exterior lines of the tract, which, it seemed to him, "could not have been attended with any advantage, as the body of the land is designated with precision in the treaty."

There is also on file a memorial dated at Fort Snelling, St. Peters, August 25, 1837, signed by Sioux Half-Breeds and their friends, asking the President to have the Half-Breed reservation at Lake Pepin "surveyed and divided among the proper claimants as soon as practicable," so that the intention of the treaty may be carried into effect, and that Governor Dodge, then superintendent of Indian affairs, and Colonel Stambaugh of Fort Snelling, or either of them, be appointed "to have the said lands surveyed and divided equitably between them as the treaty prescribes, believing that a division so made will give general satisfaction to all interested." They also appointed their friend, Col. S. C. Stambaugh, their representative at the City of Washington. An addition to the memorial made in this city, and dated the 27th of September, 1837, signed by, or on behalf of several Half-Breeds, asks that Colonel Stambaugh might be appointed to divide their reservation.

No action appears to have been had upon this memorial or its supplement.

In October, 1838, L. T. Pease and Wm. L. D. Ewing, who had been appointed commissioners to execute certain provisions of the Sioux treaty of 1837, transmitted from Fort Snelling, with their favorable recommendation, a memorial to Secretary Poinsett, signed by half and quarter-bloods of the Sioux nation, praying for the appointment of Alexis Bailly and Samuel C. Stambaugh, to make a division of the reservation among those entitled, and asking that half and quarter-bloods may participate equally in the benefit of the grant.

On the 7th of January, 1839, Commissioner Crawford reported adversely to the memorial to Secretary Poinsett; and the reasons for his conclusions will be found embodied in the following extracts therefrom:

"The first part of the request, (for a division of the reserve among the Half and Quarter-Breeds,) it appears to me, cannot be granted. The treaty limits the persons entitled to any interest in this reservation to Half-Breeds. There is no authority for making a different disposition of the land. * * * * * The treaty, it is apparent, contemplated equality of distribution among families; for it authorized the President to assign to any of the Half-Breeds a section of land, or six hundred and forty acres, and no more. This authority, by the way, does not seem to have looked to a general distribution even among the Half-Breeds, as the memorialists seem to suppose; for its language is, that the President may hereafter assign to any of the said Half-Breeds, to be held by him or them in fee simple, &c.; thus leaving it discretionary with him to grant to those to whom it would be beneficial, or for whose advantage, for any good reason, he thought fit to exercise the power.

"I also think the recommendation to Congress, which is asked for, to divide the remainder of the land upon

principles of equity among the memorialists, (Half and Quarter-Breeds,) ought to be withheld for the reasons given, against the first branch of the prayer, they being as strong as against the second.

"There is another, to my mind, great objection to all parts of the memorial, and the wishes expressed. The ninth article grants the reservation to the occupancy only of the Half-Breeds, who are to hold it by the same title, and in the same manner that other Indian lands are held. The fee simple is in the United States, and the whole will revert to them when the said Half-Breeds cease to occupy the property, unless the President, under the tenth article, should grant to some, or all of them, a section of land respectively in fee simple. So far he has authority to go. When he shall think fit to do so, depends upon his own view of the matter, and whether he shall do it at all; and the treaty is fulfilled whether his judgment leads him to the one conclusion or the other. But, having patented one section of land to each Half-Breed, all the grants in severalty contemplated by the treaty are made, and it is executed to its full and even contingent extent. The legislative authority can give the residue of the land to the Indians in fee, but I see no public good, or probable advantage to them, that would result from so doing."

Upon this report, Secretary Poinsett endorsed as follows: "I concur in the views taken by the Commissioner in this communication. J. R. Poinsett."

In a letter written by L. T. Pease, one of the late commissioners, and dated at Hartford, Conn., on the 22d of January, 1839, he assigns at length, at the request of Messrs. Stambaugh and Bailly, the various reasons which induced him to join his associate, Mr. Ewing, in recommending a division of the Half-Breed tract among those entitled. He urges with great earnestness the policy, propriety, and justice of the measure.

On the 25th of January, 1839, the Hon. James Buchanan addressed a letter to President Van Buren, enclosing one

from the Hon. James D. Doty, (also addressed to the President.) The object of these letters seemed to be to controvert the idea that the grants of fee-simple estates, contemplated by the treaty of 1830, to Sioux Half-Breeds, should be limited to those of half white and half Indian blood only. Mr. Buchanan expressed his astonishment at reading the opinion of Commissioner Crawford, and said he had always understood the term "Half-Breeds" meant neither more nor less than those of mixed blood, "without regarding the exact proportions." Such, also, he said, was the opinion of several members of the Senate practically acquainted with Indian affairs.

Mr. Doty said it was important to the interests of the frontier "that the Half-Breeds should be settled on the tract according to the intent of the treaty, and asked the appointment of some person to examine the tract, and assign to each of the Half-Breeds a section of land. He also deprecated the attempt to circumscribe the meaning of the expression "Half-Breeds," as suggested by the Commissioner, and appealed "to the writers upon that country, and to the testimony of the oldest and most intelligent of its inhabitants, to prove that the words have been used for more than half a century to designate that class of population which are of Indian extraction."

On the 22d of February, 1839, Messrs. Stambaugh and Bailly, as agents of the Half-Breeds, addressed a long letter to Secretary Poinsett for the purpose of controverting the meaning attached by Commissioner Crawford to the word Half-Breeds, and to urge their own appointment, to carry out the provisions of the ninth and tenth articles of the treaty, in accordance with the unanimous recommendation of those interested. They say, in reference to the number entitled: "We believe there are about one hundred and fifty who were born in 1830. The quantity of land to

be divided may be estimated at four hundred and eighty sections. Thus, there would be about three hundred and thirty sections to be held under the present title."

Secretary Poinsett, on the 28th of the same month, replied that the decision to which they referred was not founded on the technical meaning of the word "Half-Breeds," which he believed "included all those of Indian descent," but "upon the inexpediency of making any division, and vesting the fee of those lands in the claimants. At the same time," "he could not recommend such a measure to the President without some reservations which will prevent the land from falling into the hands of other than those of the claimants, and this cannot be done without legislative interposition." The Secretary added that it was the intention of the Department to postpone all action upon the subject until the next session of Congress; but if Messrs. Stambaugh and Bell desired it, the papers would then be submitted to that body.

On the 1st of March, Colonel Stambaugh replied, at length, to the letter of Secretary Poinsett, and pronounced a protest against a division of the reserve, purporting to be signed by a large number of the "Half-Breeds," which had been filed at the Indian Office in the fall of 1838, "a base fabrication," and entered into a minute detail of facts, to prove the truth of the assertion. Accompanying his communication are letters from Messrs. B. F. Baker, Franklin Steele, and Alexis Bailly, approving the same, as well as a power of attorney, dated the 2d of October, 1838, from many of the half-breeds of the Madawankanton band of Sioux Indians, (some of whom had signed the "protest,") authorizing Colonel Stambaugh and G. W. L. Ewing to act as their agents in securing a division of the land under the provisions of the treaty, in accordance with the memorial previously presented. Colonel Stambaugh intimates, in pretty

plain terms, that Major Taliaferro, the Indian agent, who, he said had a personal interest in having the grant limited to Half-Breeds only, was the author of the protest.

To this communication Secretary Poinsett replied, on the 20th of March, stating that "the objections raised by the Department to the project of a division was in no respect personal to Messrs. Stambaugh and Bailly, who he had no doubt were fairly selected by the parties to represent their interests and effect the division, but arose from its obligation to protect these people from the effect of their own improvidence, which can only be done by legislative provision. The Department," he added, "could not authorize the preliminary measure" of dividing the tract, but would oppose no objection—it being expressly understood that Messrs. Stambaugh and Bailly would not be entitled to any remuneration from the Government for their labor, "unless especially provided for by Congress hereafter."

On the 7th of March, 1840, Commissioner Crawford submitted to the Secretary of War a report on the letter of the Hon. John Bell, chairman of the Committee on Indian Affairs of the House of Representatives, addressed to Secretary Poinsett on the 27th of February, explanatory of the causes which delayed or prevented the execution of that provision of the treaty "of 1830 respecting fee simple grants to Half-Breeds." He contended that, in assigning the reserve for the occupancy of the Half-Breeds in common, the treaty, as he construed it, was fulfilled—"all the rest belonged to executive discretion." The President could grant a fee simple of a section of land to one or more individuals of the tribe, "that he might thing meritorious and worthy, and likely to improve the favor," &c. Of the propriety of granting the prayers of the memorialists for a division of the whole tract, Congress, he contended, are to judge. The following extracts from the report will show the reasons which led Commissioner Crawford to these conclusions:

"The land set apart by the treaty for the Half-Breeds never was granted to the United States. It was a donation by the Indians to their mixed bloods, with the consent of the United States, in whom the fee simple was vested. The grant, therefore, was limited to the Indian right—that is, to hold by occupancy; to this the United States consented, and so far only is there any contract or right, upon which they could insist, vested in the Half-Breeds by the 9th article. The claimants go further, and, in all their applications and communications, speak of a division into sections for their own use, in the memorial of last year, as well as in that now presented to Congress, of an equitable apportionment among them of the surplus to be granted in fee simple as the treaty prescribes."

This is an error. The 10th article contemplates neither in letter nor spirit a general division into sections among them, much less a ratable assignment of what would be left, after such allotments; nor is there any executive power to do either, if either had been thought politic or for Indian interest.

The tenth article authorized the President to grant; that is, he "may hereafter assign to any of said Half-Breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section of six hundred and forty acres to each individual." The treaty was executed by the assignment of the Indian title, and the occupation by the Half-Breeds of the land in common; all the rest belonged to executive discretion, which was, as I construe the treaty, to be exercised, if at all, in granting the fee simple, or a section of land, to one or more individuals, that he might think meritorious, and worthy of, and likely to improve the favor, but not looking, in any event, to a division, and, if possible, still less to an apportionment of the land that, it is said, will be left, if a section should be given to each mixed-blood.

"It may be proper to grant the prayer of the memorial. Of this, Congress are to judge; for without the authority and sanction of the law, the power, it seems to me, is wanting. Should the legislature so declare its pleasure, it will be the duty of the Department to see it executed."

Secretary Poinsett, in transmitting the above mentioned report to the Hon. John Bell, on the 13th of March, 1840, says: "In this report the Department fully concurs, and is of the opinion that, without some restriction, these lands would, if divided as prayed for, in a short time fall into the hands of speculators. Secretary Poinsett at the same time transmitted copies of all the papers in reference to the matter which were of file in the Department.

On the same day, Colonel Stambaugh addressed a letter to Secretary Poinsett, enclosing a memorial to the President from certain Sioux Half-Breeds, and also a letter from Alexis Bailly, on the subject of the reserve.

On the 12th of March, 1839, Secretary Poinsett caused a "public notice" to be published in certain newspapers in Missouri and Iowa, to the effect that no sale of the undivided interest held in said Half-Breed reserve, "will be recognized or regarded as valid by the President of the United States."

A memorial of about sixty relatives of the Sioux Indians, dated at St. Peters on the 24th of June, 1839, was addressed to the President, urging the policy and expediency of a division, and announcing the appointment of Messrs. Stambaugh and Bailly, and N. Boilvin, to represent their interests. They recommend the passage of a law by Congress authorizing a division of the tract, after supplying individual reservations upon the same principles.

On the 17th of December, 1839, Governor Dodge, of Wisconsin, enclosed to this office a copy of a preamble and resolution of the legislature of the Territory of Wisconsin,

instructing the delegate from the Territory "to use his influence to procure the passage of a law directing the early survey and apportionment in fee simple among the claimants," in order to prevent the suffering and continual and heavy loss arising from the uncertain tenure by which they now hold their reserve. The receipt of that resolution was acknowledged on the 23d of January, 1840.

On the 22d of February, 1840, the Hon. Wm. W. Chapman, of Iowa, enclosed a memorial of the legislative assembly of that Territory, approved the 31st December, 1839, urging the policy of a division of the Lake Pepin reserve, as a measure that would "tend greatly to promote the prosperity and security of that portion of the Territory," &c. Its receipt was acknowledged on the 13th of March, with a copy of the report of the 7th of that month, showing the views of the Department.

On the 30th of March, 1840, Commissioner Crawford, in compliance with the verbal request of the Hon. John Bell, chairman of the Committee on Indian Affairs of the House of Representatives, submitted an estimate for the purchase of the Half-Breed tract. The salary of the Commissioner and Secretary, and the incidental expenses, he estimates at $2,500, and the 384,000 acres of land contained in the reservation, at one dollar per acre. He says the tract, being exactly thirty-two by fifteen miles, would, but for the meanders of the Mississippi river, contain only 307,000; but these meanders, he thinks, will give upwards of 600 sections, or 384,000 acres. He supposes that two hundred may comprise the whole number of half and quarter-bloods, and thinks, as they are in some measure individual owners, that "each of them should sign the compact for the purchase of the reserve."

On the 9th of July, 1840, Colonel Stambaugh addressed a letter to the chairman of the Committee on Indian Af-

fairs of the House of Representatives, calling attention to the memorial of the Half-Breeds of August, 1837, proposing the appointment of commissioners to divide the tract among the claimants of mixed blood, who, he supposed, did not amount to two hundred persons; and proposing, on their behalf, to relinquish the balance of the reserve, "say 256,000 acres, for the sum of $200,000." To show the impolicy of not assenting to his proposition, Colonel Stambaugh referred to the case of the Sacs and Foxes at the Des Moines Rapids, in which those Indians "sold their common interests for a mere trifle, and afterwards finding that the purchasers might procure a change of tenure, they sold the same interest to others, which gave rise to endless litigation."

Governor Doty, in a letter addressed to Secretary Bell and dated on the 30th of June, 1841, urged the policy of purchasing the Half-Breed tract, and states that the reservees are anxious to sell their interest to the United States. He proposes, if so instructed, to treat with them.

In a letter dated in this city, in July, 1841, the Hon. John W. Parker, of the legislature of Iowa, urges upon the Secretary of War the policy of a division of the Lake Pepin reserve in severalty; and, by the way of illustrating the policy of his advice, refers to the case of the Sacs and Foxes at the Des Moines Rapids, which, in consequence of the Indians having sold their interests in the common reserve, "has involved that whole country in litigation, and the Territory in great expense."

On the 30th of July, 1841, Colonel Stambaugh again called the attention of Secretary Bell to the subject, and referred him to a member of the Iowa legislature, and the late delegate from that Territory, both then in this city, for information as to the policy and expediency of the measure of dividing the Half-Breed reserve.

In his annual report of the 10th of September, 1845, speaking of Half-Breed reservations generally, Superintendent Harvey, of St. Louis, expresses the opinion that the interests of the Indians, in all cases, would be advanced by delivering to them patents for their reservations, with authority to dispose of them by sale, "as they would, nine times in ten, make a better sale with a patent than otherwise."

Commissioner Medill, in replying to a letter of the superintendent at St. Louis, said, in September, 1847, that he agreed with his predecessor as to the impolicy of dividing the Half-Breed tract, and allotting particular tracts to the claimants respectively in severalty, to be held in fee simple; but that the suggestion of General Milburn, (whose letter Superintendent Harvey had enclosed,) that "measures be adopted to extinguish the Indian title to the land, would receive due consideration."

In February, 1849, the Hon. H. Sibley enclosed a letter from Dr. D. Dale Owen, geologist, to a Mr. Erisbois, in which Dr. Owen says the Half-Breed tract "is a mineral region," and that "lead will be found there, and probably copper also." Mr. Sibley therefore hoped, in view of its value as such, that the department would favorably consider the proposition which he had made, as attorney for a large majority of the claimants, to sell the tract.

Commissioner Medill gave an unfavorable answer, and informed Mr. Sibley that various propositions for the sale of partition of this reserve had been submitted to the Department, "and that it was determined, in every instance, that the matter should first, in some way, receive the sanction of Congress." The power of attorney, which was considered as defective, was returned with this answer on the 16th of February, 1849.

The eighth article of the treaty of the 5th of August, 1851, between Commissioners Lee and Ramsey and the Dakota Indians, is in the following words:

"Article 8. The Half-Breeds of the Sioux nation having failed and refused to avail themselves of the provisions for their benefit in the ninth and tenth articles of the treaty concluded at Prairie du Chien on the 15th of July, 1830, it is hereby agreed, at their request, that in lieu of the tract of land set apart for the occupancy of said Half-Breeds, there shall be paid to them by the United States, under the direction of the President, the sum of one hundred and fifty thousand dollars, ($150,000:) Provided, that the non-ratification of this article shall in no manner affect the other provisions of the treaty."

This article was, however, stricken out by the Senate, in executive session, on the 22d day of June, 1852, which, as before stated, leaves the matter just as it stood in 1836, when a proposition for a division or purchase of the tract was first made.

Recently there has been received from Governor Gorman, of Minnesota, a petition from ten of the Half-Breeds residing upon the Lake Pepin reserve, dated at Wabashaw, in Wabashaw county, in said Territory, in June last, praying that the President may cause to be conveyed to each of the petitioners, in fee simple, under the superintendence of Governor Gorman, a section of land, in pursuance of the power vested in him by the 10th article of the treaty of 1830.

The petitioners say they have resided twelve years and upwards upon their respective tracts; that emigrants are daily making claims and settling permanently upon the reserve—"a circumstance," they say, "pregnant with much evil, and calculated to embarrass its final adjustment," &c.; and they ask that their respective buildings and improvements may be included in and form a part of their reserves of 640 acres each. The petition is favorably en-

dorsed by Governor Gorman, under date of the 15th of July last, in the following words:

"From the intelligent character of these petitioners, and from the fact that our Territorial law has given them the right of citizenship, voting, &c., I especially recommend that their prayer be granted."

A petition of the Madawakanton Half-Breed Sioux, dated at Wabashaw the 14th of October last, and addressed to Governor Gorman, (lately left in this office,) represents that irresponsible individuals among themselves have made sales of their right of common occupancy to citizens of the United States, the result of which, they say, "will lead, among the present occupants, to endless litigation;" that the present white settlers on their tracts "have made permanent establishments, and bid defiance to your petitioners, and have absorbed some of the most important points;" that they are destroying their best timber, and even laying out a portion of their lands "into town plats, and offering lots for sale, to the prejudice and against the interest of petitioners, and contrary to law." They therefore pray for the removal of every person trespassing upon their lands contrary to the intercourse law.

This petition having been referred by Governor Gorman to D. H. Duttin, Esq., the United States district attorney for the Territory, for his opinion as to the powers of the governor to remove intruders, that officer, in a written opinion dated the 8th of December last, (which accompanies the petition,) quotes numerous authorities to show that the land in the reservation "can only be taken possession of and held by a patent from the Government of the United States, or a continued permission from the Sioux Half-Breeds to occupy the same," and that the United States had the undoubted right, under the act of June 30, 1834, "to employ the military force of the country to drive off all persons found upon the territory in question contrary to law," &c., &c.

The fact has also been brought to my notice, that a petition, very numerously signed by the Half-Breed claimants, was drawn up at Red Wood agency, in November last, and addressed to Governor Gorman, urging application to Congress, on their behalf, for the passage of a law authorizing the issue of land scrip in their favor for 640 acres of land each, in satisfaction of their claims to fee simple grants under the treaty, to portions of the Lake Pepin reserve. The petition has been recently filed.

A more recent petition of some of the Half-Breeds, which you referred here, on the 21st ultimo, with directions for a report of the facts, asks the President (to whom it is addressed) to appoint a commission to ascertain the persons and the number that may be entitled, to enable him "to determine the quantity of land that can be granted to each." While of the opinion that if the maximum quantity of 640 acres be granted to each, it will not absorb all the reserve, the petitioners say they are willing that the President "should patent upon the conditions that they (the claimants) should relinquish all right and title to the surplus."

The Sioux bands who were parties to the treaty of Prairie du Chien of July 15, 1830, have, by the treaties of July 23, and August 5, 1851, relinquished all their claim to the country in which the Half-Breed tract is situate; and in the adjustment of the question there is, in my opinion, no interest to be considered but that which the Half-Breeds obtained by virtue of the ninth article of the treaty of July 15, 1830—that is, a right to "occupy the said tract of country, they holding by the same title and in the same manner that other Indian titles are held. But the President of the United States may hereafter assign to any of the said Half-Breeds, to be held by him or them in fee simple, any portion of said tract not exceeding a section of 640 acres to each individual."

I am informed that many of the Half-Breeds are very competent to manage their own affairs, and that they have good improvements on the reserve. It is said that others are altogether incompetent to take care of property. Some of the thrifty Half-Breeds, it is said, have gone off of the reserve, and bought land and made improvements; being unwilling to do so on the reserve, because they could not have land assigned to them in severalty.

No good can result to the Half-Breeds by the continuance of this occupancy in common. Some legislation will, in my opinion, be necessary before a change can well be made, if for no other purpose than to protect the interests of such portion of these people as are incompetent to manage their own affairs.

The laws of the Territory do not operate over the reserve, and the intercourse act is of but little protection to the residents, who are no doubt subject to all the temptations and adverse influences incident to their peculiar location.

In addition to this, the border white settlers in Minnesota must experience great inconvenience from the state of things now existing on Lake Pepin reserve.

I can find nothing in this office from which I am enabled to come to any satisfactory opinion as to the number of Half-Breeds who would be entitled to land, if the President were to determine to assign it in fee simple.

In 1839, it was the opinion of Messrs. Stambaugh and Bailly that there were about one hundred and fifty persons born in 1830 who would be entitled to the grant in fee, and that the reserve would satisfy their demands for 640 acres, and leave a surplus of 330 sections.

The delegate from the Territory has recently informed me that, in his opinion, the land embraced in the reserve

will not be sufficient to allot for each Half-Breed 640 acres. It is, however, understood that he claims that all the descendants of the Half-Breeds of 1830 are proper subjects to participate in the benefits of this land, under the Executive discretion, as they are to enjoy the right of occupancy while it is held in common.

Whether the Executive discretion be exercised, and the land set apart in severalty, or the proposal to issue scrip in lieu of the land be adopted, some legislative provision to guard the interests of the incompetent will be necessary.

I avail myself of this occasion to say that the lands assigned, by the 10th section of the same treaty, to the Half-Breed Ottoes and others between the two Nemaha rivers, in the Indian country, in view of the expected changes in that country, should, before the same embarrassment and difficulties that surround the Lake Pepin reserve, be adjusted with reference to the settlement and occupancy of the Indian country, before that event occurs.

Very respectfully, your obedient servant,

GEO. W. MANYPENNY,
Commissioner.

HON. R. McCLELLAND,
Secretary of the Interior.

GENERAL LAND OFFICE,
February 23, 1854.

Sir: I have the honor to acknowledge the receipt of your communication of the 20th instant, and, in relation thereto, beg leave to state: that on the first view of the case, I was inclined to consider the Sioux Half-Breeds as a band of that nation whose lands could only be acquired by treaty. Having understood, however, from Hon. Mr. Rice and others, perfectly familiar with the facts, that such is not the case, but that they are American citizens, and for

that reason the Senate properly refused to treat with them, the only mode of removing this reservation is to extinguish their claims under the treaty of 1830, by purchase with money, or in the mode contemplated by the bill which you enclosed. The latter, in my opinion, is preferable, for every reason. No proposition, however, is made for the expenses attending the taking of the census of the persons contemplated by this bill, for preparing or issuing the scrip, or for necessary surveys. These expenses will not be heavy or important; but it would seem expedient to attach another section, providing that they shall be paid out of any money in the treasury not otherwise appropriated.

The regular surveys have been extended almost up to this reservation, and it would be expedient that they should be continued so as to include it. The outer boundaries of the reserve could be run to ascertain its area, and the amount, not exceeding 640 acres in any case, to which each would be entitled under the treaty. There would be no necessity, however, for making fractions on each side of the boundaries of this reserve, as the scrip proposed by the act could be located by legal subdivisions.

By this means the harmony and uniformity of the surveys would not be marred, and the expense would be less than if the reserve were specially surveyed.

The following is respectfully suggested as the draught of the additional section:

"Section 2. And be it further enacted, That all necessary expenses of taking the census of said Half-Breeds, issuing the scrip, and making surveys, not exceeding the usual rate per mile allowed by law for such surveys in that region, shall be paid out of any money in the treasury not otherwise appropriated."

The papers accompanying your letter are herewith returned.

I am, very respectfully, your obedient servant,

JOHN WILSON,
Commissioner.

HON. D. B. WRIGHT,
Of the Committee on Indian Affairs, House of Reps.

APPENDIX D.

No. 639.

CIRCULAR RELATIVE TO THE LOCATION OF HALF-BREED DACOTAH OR SIOUX SCRIP, ISSUED UNDER THE ACT OF CONGRESS, APPROVED JULY 17, 1854. (243.)

General Land Office, March, 21, 1857.

Gentlemen:—The Commissioner of the Indian affairs, by letter of the 25th ultimo, has advised this office that scrip has been prepared for six hundred and forty persons, as Da[illegible]otah or Sioux Half-Breeds or mixed-bloods, under the Act of Congress of July 17th, 1854, above mentioned; that five pieces of scrip will be issued to each person, as follows; two for forty acres each; one for eighty acres, and two for one hundred and sixty acres each, making an aggregate for each one of four hundred and eighty acres, designated thus, for example, in the first case: No. 1 A, forty acres; No. 1 B, forty acres; No. 1 C, eighty acres; No. 1 D, one hundred and sixty acres; No. 1 E, one hundred and sixty acres. Blank forms of these five pieces are sent herewith, for your information, so that you may have a proper idea of the original pieces of scrip when they are presented for location.

This scrip, as declared on its face, is locatable upon the following described classes of land, viz:

Upon the Sioux half-breed reservation, which is situated wholly in the two land districts of Red Wing and Faribault, in Minnesota; that portion of said reserve situated in the former being in Townships 111 to 113, inclusive, Ranges 10 to 15 West; that in the latter being in Townships 108 to 110, Ranges 9 to 15.

1st. The scrip may be located by the half-breeds upon any land within this reserve upon which, at the date of the Act of July 17, 1854, he was an actual bona fide settler.

2d. Upon any land within said reservation which, at the date of said Act, was not so occupied by a half-breed, or any other person who may have gone into said reservation under authority of law.

To constitute a half-breed or mixed blood an actual and bona fide settler within the meaning of the statute, it must be shown by proof satisfactory to you, that he was an occupant by personal inhabitation within said reservation at or before the passage of the Act of July 17, 1854, and in such case he will be entitled to locate his scrip, embracing his improvements, conforming to the legal sub-divisions of the public surveys, unless such location interferes with another bona fide settler, when each will be allowed to take such sub-divisions as will embrace his improvements.

The persons who have "gone into said Territory by authority of law," the land officers at Red Wing and Faribault will understand are only such white persons as, prior to the passage of said Act of July 17, 1854, had entered said reservation under the Indian Inter-course laws—such as licensed traders, authorized missionary teachers, and other persons in the employ of Government in connection with Indian affairs, and who inhabited the lands and made improvements thereon prior to said Act. Improvements of this class of persons are shielded from the scrip; yet you can do no act in the way of giving title to the white claimants of such improvements because the law has conferred no power on the Executive for this purpose.

3d. The said Act authorizes also the location of scrip "upon any other unoccupied lands subject to pre-emption or private sale." Or,

4th. "Upon any other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements."

Where the scrip may be located on unsurveyed lands outside of the reservation on which the half-breed has improvements, and which is not reserved by Government, his application for location should be accompanied by a diagram and description, denoting natural objects and distances, so as to fix, with certainty, the exact locality, wanted, serve as the best notice in our power to settlers, that conflict may be avoided, and enable you, when the public surveys are made, to designate the legal sub-divisions embracing the location.

The land selected in satisfaction of a certificate of scrip must be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person, or by his or her guardian or duly authorized agent. The application should be duly attested in each case by the Register and Receiver, and attached to each should be your certificate to the following effect:

"Land Office at.....

....., 18..

We hereby certify that the within scrip has this..... day of....., been located on th....., containing ..... acres, agreeably to the Act of 17th July, 1854, and by the party duly authorized to make the location.

Attest:.....Register.

.....Receiver."

No receipt is to be issued to the locator, except in unavoidable cases where there may be a small excess in the area of the location over the scrip, and in that case it must be paid for, and the Receiver will issue his receipt, which he will number and account for, as in the case of bounty land warrant excess. But no certificate of purchase is to be issued; the scrip and application, instead of certificates of purchase, being the instruments of title which are to be returned to the General Land Office in this class of business.

The Register, however, in the case of excess payments, will append to the application his official statement, that .....acres of said tract, the excess, has been paid for, per Receiver's receipt No.....

Your proceedings in locating the certificates, and your official returns, are to be kept entirely separate and distinct from other sales and locations. At the close of each month the Register and Receiver will make a separate official return of scrip located, with all the papers on file connected with each location, accompanied by a monthly abstract; Form A, herewith.

You will observe that this scrip is *not assignable*, transfers of the same being held void; consequently, each certificate, as hereinbefore stated, can only be located in the name of the half-breed; and such certificates or scrip are not to be treated as money, but located acre for acre.

No fees or commissions of any kind are allowed by this office for services of the Land Officers in this matter, such being an incident to their general duties, and you are, therefore, hereby interdicted from charging or receiving any compensation for such services. This scrip is, of course, not applicable to any class of Indian trust lands, but only to unreserved, unincumbered public lands.

Very respectfully,

Your obedient servant,

THOS. A. HENDRICKS,

Commissioner.

Register and Receiver at .....

APPENDIX E.

No. 281 B.

RELATIVE TO THE LOCATION OF HALF-BREED DACOTAH OR SIOUX SCRIP, ISSUED UNDER THE ACT OF CONGRESS APPROVED JULY 17, 1854,—U. S. STAT. AT LARGE, VOL. 10, P. 304.

General Land Office, February 22, 1864.

Gentlemen:—Questions frequently arise in regard to the location of Dacotah or Sioux Half-Breed scrip issued some years ago from the office of Indian Affairs.

The issue was as follows;—2 for 40 acres each; 1 for 80 acres; and 2 for 160 acres each; making an aggregate for each one of 480 acres, designated thus, for example, in the first case: No. 1 A, 40 acres; No. 1 B, 40 acres; No. 1 C, 80 acres; No. 1 D, 160 acres; No. 1 E, 160 acres.

This scrip as declared on its face, is locatable upon the following described classes of lands, viz:—

Upon the Sioux half-breed reservation, situated wholly in the St. Peter Land District, in Minnesota; being in townships 108 to 110, Ranges 9 to 15.

APPLICATION OF SCRIP TO SPECIAL LOCALITIES.

1st. The scrip may be located by the half-breed upon any land within this reserve upon which, at the date of the act of July 17, 1854, he was an actual bona fide settler.

2d. Upon any land within said reservation which, at the date of said act, was not so occupied by a half-breed, or any other person who may have gone into said reservation under authority of law.

To constitute a half-breed or mixed blood an actual and bona fide SETTLER within the meaning of the statute, it must be shown, by proof satisfactory to you, that he was

an occupant by personal inhabitation within said reservation at or before the passage of the act of July 17, 1854; and in such case he will be entitled to locate his scrip, embracing his improvements, conforming to the legal subdivisions of the public survey, unless such location interferes with another bona fide settler, when each will be allowed to take such subdivisions as will embrace his improvements.

The persons who have "gone into said Territory by authority of law," are, as the Land Officers at St. Peter will understand, only with such persons as, prior to the passage of said Act of July 17, 1854, had entered said reservation under the Indian intercourse laws, such as licensed traders, authorized missionary teachers, and other persons in the employ of Government in connection with Indian affairs, and who inhabited the lands and made improvements thereon prior to said Act.

APPLICATION OF SCRIP TO GENERAL LOCALITIES.

Besides these special stipulations in the law in regard to locations in the Minensota half-breed reservation, the aforesaid statute enlarges the sphere of location by authorizing the location of the scrip.

3d. "Upon any other unoccupied lands subject to preemption or private sale."

You will understand, however, that no mineral or reserved lands can be taken by this scrip, nor can it be located upon the even numbered, double minimum, reserved sections, nor upon any lands on which there is an actual settlement; but it may be located.—

4th. "Upon any other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements."

Where the half-breed for himself may make actual settlement, his improvements will be notice on the ground to any other settler, and in this respect he will stand on the same basis as a pre-emptor of unsurveyed land, and of course cannot adjust his location until after the return of the township plat to the District Land Office. Hereafter, and within three months, he should repair to such Land Office, file his scrip with his affidavit, designating specifically, in compact legal subdivisions, the tracts embracing his improvements, and should state in his affidavit the character and extent of these improvements, and file testimony of competent witnesses corroborative of his statement.

5th. When not located by the reservee in proper person, the application to locate must be accompanied by the affidavit of the agent that the reservee is living, and that the location is made for the sole use and benefit of said reservee.

The land selected in satisfaction of a certificate of scrip must of course be located in the name of the party in whose favor the scrip is issued, and the location may be made by him or her in person, or by his or her guardian or duly authorized agent. The application should be duly attested in each case by the Register and Receiver, and attached to each should be your certificate to the following effect:

"Land Office at.....
.....1864.

"We hereby certify that the within scrip has this ..... day of.....been located on the.....containing .....acres, agreeably to the act of 17th July, 1854, and by the party duly authorized to make the location.

Attest:

....., Register.
....., Receiver."

No receipt is to be issued to the locator, except in unavoidable cases, where there may be a small excess in the area of the location over the scrip, and in that case it must be paid for, and the receiver will issue his receipt, which he will number and account for, as in the case of bounty-land warrant excess. But no certificate of purchase is to be issued; the scrip and application, instead of certificates of purchase, being the instruments of title which are to be returned to the General Land Office in this class of business.

The Register, however, in the case of excess payments, will append to the application his official statement, that .....acres of said tract (the excess) have been paid for, per Receiver's receipt No. .....

Your proceedings in locating the certificates, and your official returns, are to be kept entirely separate and distinct from other sales and locations. At the close of each month the Register and Receiver will make a separate official return of scrip located, with all the papers on file connected with each location, accompanied by a monthly abstract.

You will observe that this scrip is not assignable, transfers of the same being held void; consequently each certificate, as hereinbefore stated, can only be located in the name of the half-breed; and such certificates or scrip are not to be treated as money but located acre for acre.

No fees or commissions of any kind are allowed by this office for services of the Land Officers in this matter, such being an incident to their general duties; and you are, therefore, hereby interdicted from charging or receiving any compensation for such services. This scrip is, of course, not

applicable to any class of Indian trust lands, but only to unreserved, unencumbered public lands.

Very respectfully,

Your obedient servant,

J. M. EDMUNDS,

Commissioner.

Register and Receiver at..... .....

APPENDIX F.

SIOUX HALF-BREED RESERVE AT LAKE PEPIN.

Not Transferable or Assignable.

No.....

Certificate or Scrip)
Acres,.....)

Issued in accordance with the provisions of the Act of Congress, approved July 17, 1854, entitled "An Act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota, belonging to the Half-Breeds or mixed bloods of the Dacotah or Sioux nation of Indians, and for other purposes."

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS.

Five Certificates or pieces of Srcip,)
No. .... A. to No. .... E., A. and B)
being each for 40, C. for 80, and D. and)
E. each for 160 acres, issued in satisfac-)
tion of this claim for 480 acres.)

Whereas, it has been duly reported to this office, by the Commissioners appointed by the President as ascertain the number and names of the Half-Breeds and mixed-bloods entitled to share in the benefits of the grant or reservation above particularly mentioned, that..... of about the age of .....years, is one of the said Half-Breeds or mixed-bloods of the said Dacotah or Sioux nation of Indians, specified in the said Act of Congress, and as such is entitled to receive a Certificate or Scrip, pro rata

in exchange for ..... right, title, and interest in and to the said reservation of land lying on the west side of Lake Pepin and the Mississippi River, in the said Territory of Minnesota, which was set apart for the benefit of said Half-Breeds and mixed-bloods by the 9th Article of the Treaty of Prairie du Chien of July 15, 1830;

And whereas, the said report of the said Commissioners has been approved and confirmed by the President of the United States; and the said..... has duly and formally relinquished to the United States all ..... right, title, and interest in and to the said reservation of land, as by ..... instrument of relinquishment sufficiently appears;

Therefore, be it known that this certificate or scrip issued by authority aforesaid, will entitle the said..... ..... to locate, at the proper Land Office, the quantity of ..... acres of land, as a part of four hundred and eighty acres claim, upon any of the lands within the said reservation that were not occupied on the 17th of July, 1854, by actual and bona fide settlers of the said Half-Breeds or mixed-bloods, or such other persons as had at that date, or prior thereto, gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by Government, upon which they have respectively made improvements.

This Certificate or Scrip is not by law transferable, and any assignment or conveyance of the same is therefore void.

Given under my hand and seal of the Department, at Washington, this ..... day of .....A. D. eighteen hundred and .....

.....,

Commissioner.

APPENDIX G.

DEPARTMENT OF THE INTERIOR.

WASHINGTON, March 27, 1863.

SIR:

I now return to you the papers submitted with your report of the 20th inst. upon the appeal of S. A. Peugh, attorney, representing the title of Sophia Felix, from your decision of the 15th December, 1862, against the location made by her on the 21st November 1861, of her scrip No. 181 A. and No. 181 C. upon the N. 1-2 and S. E. 1-4 of the S. E. 1-4 of Sec. 9, Tp. 15 N., R. 13 E., Omaha district, Nebraska, and in favor of the pre-emption claim of M. W. Carroll, under a settlement commenced December 29, 1861.

The location of Felix is anterior to the pre-emption settlement and if valid should be patented. It is plain from the decision of this Department of July 30, 1862, and is conceded by your office, that the land was subject to location on the 21st November 1861, but you decide against the location for these reasons:

1st. Felix was not a resident upon the land and had no improvements thereon at or before the date of location.

2nd. That "the location of the scrip, although made in her name, was not made by her in person, nor by her guardian or duly authorized agent for her use and benefit, but by an unauthorized person, and for the use and benefit of a person having no legal interest therein."

The law under which Felix claims, is that of the 17th of July 1854 (Stat., Vol. 10, p. 304), which provided for an exchange of lands with the Sioux half-breeds for the tract lying on the west side of Lake Pepin. Sophia Felix was one of the half-breeds, and received her scrip regularly through the officers of the Indian service;—and the law pro-

vides that such scrip "may be located upon any of the lands within said reservation not now occupied by actual and bona fide settlers of the half-breeds or mixed bloods or such other persons as have gone into said Territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by Government, upon which they have respectively made improvements, etc."

The land located by Felix is not within the reservation —but it had been surveyed, and was subject to pre-emption at the date of location, and was unoccupied by an adverse claimant. I therefore deem the location to be good. The law uses the disjunctive conjunction, in the paragraph quoted, and it is in the cases where unsurveyed lands are claimed by a half-breed that improvements are requisite as an antecedent to the right of location, and I therefore do not regard your first objection to Felix's claim as sanctioned by the law.

As to your second objection, I remark that this kind of scrip is by the law, declared to be not assignable. In this case Sophia Felix has signed the application to locate her own scrip. The signature must be treated by us as genuine, when there is no proof to the contrary; and when she has made no complaint against this use of her scrip. The fact that the scrip was carried to the Land Office and the business transacted by another person, does not affect the validity of her entry of the land.

As the certificate of location issued in her name, and the patent will issue to her, neither the Register's report or the affidavits of third parties can be admitted to establish the interest of any other person in the location.

We could not recognize such interest if an assignment in writing was produced and duly proven to have been executed by, the Half-Breed—whether she

could sell or did sell the land after the location of her scrip we need not inquire, and the validity and effect of any such sale or assignment must be left to the arbitrament of the Courts of Law. The location is valid on its face, and the owner of the scrip, so far as she is represented at all, demands the patent to issue in her name, and my decision is that she is entitled thereto.

The subsequent and interfering claim of Carroll must be rejected. The Secretary of the Interior directs me to advise you of these conclusions of the Department in this case.

I am Sir, Very Respectfully,

Your Obedient Servant,

W. T. OTTO,

Assistant Secretary.

The Commissioner of the General Land Office.

APPENDIX H.

A. S. G. F. M. M.

DEPARTMENT OF THE INTERIOR.

WASHINGTON, June 29, 1876.

SIR:

I have considered the case of James Murphy vs. Josephine M. Jones involving the right to the S. W. 1-4 of Section 6, T. 139, N. R. 44 W., Detroit District, Minnesota, on appeal from your decision of October 18, 1875.

The official plat of the survey of this township was filed in the Local Office March 26, 1872.

June 14, 1871, Joel D. Jones, guardian of Josephine M. Jones, by his attorney, George B. Wright, located certificate No. 42 D, Sioux half-breed scrip on the above described land.

August 12, 1872, James Murphy filed D. S. for said land alleging settlement on the same day.

From the testimony and papers filed in this case, it appears that prior to the location of said scrip on said land, George B. Wright, the attorney of the guardian of Josephine M. Jones, and for and in her behalf plowed about one-half acre of said land, and it is alleged, cultivated the same, but in what manner does not appear.

Murphy alleges that at the time he settled upon said land, there was nothing indicating that there were any improvements upon it, and the testimony presented by him fully corroborates his statements.

Subsequent to Murphy's settlement on the land, he built two houses, dug a well, plowed and cultivated eleven acres thereof and has fenced about thirty acres of the same.

You held that these improvements made in behalf of the scripee upon the land were sufficient to warrant the location of said scrip thereon and awarded it to her.

The Act of July 17, 1854 (10th Stats., p. 304), provides that the owners of this class of scrip may locate it upon unsurveyed lands upon which they have made improvements.

The land in question not having been surveyed at the time this location was made upon it, the question arises what amount of improvements shall be made and of what character shall they consist to authorize the scripee to locate said scrip upon it.

Webster defines the word improvements, when applied to lands to mean, "Valuable additions or meliorations; as buildings, clearings, drains, fences, etc."

Neither the amount, nor the character of the improvements required by this act are specified, but I am of the opinion that they should be such as the true meaning of the word signifies, valuable additions to the land.

The testimony presented in this case does not warrant the conclusion that the work done upon this land was in fact, or was intended to be, of any permanent value to it whatever. It seems rather to have been done for the purpose of appearing to comply with the law without in fact doing so. I am of the opinion, therefore, that the improvements placed upon this land were neither sufficient in amount, nor of such permanent character, as to entitle the scripee to locate said scrip upon it.

January 5th, 1876, Murphy filed an appeal from your decision of Oct. 18, 1875. Thereupon the attorneys of Jones moved to dismiss said appeal for the following reasons:

First—That the appeal was not taken in proper time, and

Second—That the points of exception to your decision were not stated.

By your decision of Feb. 23rd, 1876, you denied said motion and as I think correctly on the grounds and for the reasons therein stated.

Your decision awarding the land in contest to Josephine M. Jones is reversed, and I direct that you cancel her location thereon and that upon Murphy's showing full compliance with the law, he have the patent thereof.

The papers transmitted with your letter "G" of March 3, 1875, are herewith returned.

Very respectfully,

Z. CHANDLER,
Secretary.

To the Commissioner of the
General Land Office.

APPENDIX I.

Allen et al. vs. Merrill et al., 8 L. D. 207.

SYLLABUS.

The Commissioner of the General Land Office has jurisdiction to order a hearing for the purpose of determining the validity of a scrip location, either under a protest against such location, or in the absence of any protest.

Under a hearing ordered for such a purpose the voluntary appearance of other adverse claimants confers upon the Commissioner full jurisdiction to pass upon the validity of the conflicting claims.

The adjustment of a scrip location to the lines of the public survey does not validate a location theretofore invalid; it simply serves to designate by Congressional sub-divisions the land covered by the location.

The Sioux Half-Breed scrip authorized by the act of July 17, 1854, conferred upon the Half-Breed a personal right only, and his right of location thereunder is not subject to transfer.

As the transfer of this scrip is prohibited by statute, the Department will not recognize the right of location in one claiming such right by virtue of two powers of attorney, one to locate said scrip, and the other to sell the land covered by the location.

The right of location upon unsurveyed lands, conferred upon the Half-Breed, is limited by a requirement that he shall make improvements thereon; but improvements made for the immediate benefit of one claiming the right of location under a power of attorney, are not within the intendment of the statute.

* * * * * * * * *

SECRETARY VILAS TO COMMISSIONER STOCKSLAGER, FEBRUARY 18, 1889.

The important question for decision in this case is the validity of the location made with the Sioux half-breed scrip. By the ninth article of the treaty concluded with the Sioux Indians at Prairie Du Chien in 1830 (7 Stat., 328) it is provided that, "The Sioux bands in council having earnestly solicited that they might have permission to bestow upon the half-breeds of their nation," a tract about fifteen by thirty-two miles in size, lying west of Lake Pepin, the United States agree to suffer said half-breeds to occupy said tract of country; they holding by the same title, and in the same manner that other Indian titles are held. By the act of July 17th, 1854 (10th Stats., 304) the President was authorized, "To exchange with the half-breeds or mixed bloods of the Dacotah or Sioux nation of Indians, who are entitled to an interest therein," for the said tract of land; and for that purpose was authorized to cause to be issued "Certificates or scrip for the same amount of land to which each individual would be entitled in case of a division of the said grant or reservation pro rata among the claimants which said certificates or scrip may be located upon any of the lands within said reservation not now occupied by actual bona fide settlers of the half-breeds or mixed bloods, or such other persons as have gone into said territory by authority of law, or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands, not reserved by government, upon which they have respectively made improvements; Provided, that said certificates or scrip shall not embrace more than six hundred and forty, nor less than forty acres each, and provided that the same shall be equally apportioned, as nearly as practicable, among those entitled to an interest in said reservation; And provided further, that no transfer or conveyance of any of said certificates or scrip shall be valid."

Much refinement of argument has been pressed in relation to the construction of this statute, based upon the title which the half-breeds had to the reservation they surrendered; but there appears no necessity to grope for motives on the part of Congress with a view to understand what has been declared, since the language of the provisions is plain. Obviously, Congress intended to make the scrip a purely personal right in the half-breed, and, while no restriction was put upon his power of alienation of the land when it should be located, until that time no other person should have any share or interest in this right, nor should the half-breed transfer to another the privilege which Congress had given to him to locate the land. This limitation was peculiarly appropriate to the right to locate scrip upon unsurveyed land, no right to purchase which was prior to this act extended by the land laws, to any other person, nor any privilege to gain a pre-emptive right ever allowed to any but the actual settler.

To give effect to this policy, the regulations of the Land Office have contained from the beginning instructions looking to the maintenance in him of the half-breed's right. The first circular in 1857 (1st Lester, 627) calling attention to the unassignability of the scrip, only directed the location to be in the name of the Half-Breed, and stated that the scrip could not be treated as money, but located only acre for acre. In 1864, a new circular was issued (2 Lester, 307; 1 C. L. L., 721 1 C. L. O., 142) in which, speaking of location upon unsurveyed lands, it was said:

"Where the half-breed for himself may make actual settlement, his improvements will be notice on the ground to any other settler, and in this respect he will stand on the same basis as a pre-emptor on unsurveyed land, and of course, cannot adjust his location until after the return of the township plat to the District Land Office. Hereafter and within three months, he should repair to such land

office, file his scrip with his affidavit, designating specifically, in compact legal subdivisions, the tracts embracing his improvements, and should state in his affidavit the character and extent of these improvements, and file testimony of competent witnesses corroborative of his statement."

Afterwards in 1872, a special circular (1 C. L. L., 723) upon the subject of location of this scrip on unsurveyed lands was issued in which, after reciting the use which had been made of the scrip to strip the timber from unsurveyed lands by filing the scrip as a preliminary location and afterwards withdrawing it, the following directions to registers and receivers were gven:

1st. "That the application must be accompanied with the affidavit of the Indian, or other evidence that the land contains improvements made by or under the personal supervision or direction of said Indian giving a detailed description of said improvements, and that they are for his personal use and benefit; in other words, you should be satisfied that the Indian has a direct connection with the land and is claiming the same for his personal use. Unless such evidence is filed, you will reject the application.

2d. The filing of the scrip must be considered in the character of a location, and should such filing not be followed within the time prescribed by our circular of February 22, 1864, relating to the location of this scrip, by an adjustment to the offcial plat of survey, you will, immediately thereafter, adjust the same yourselves, as near as may be practicable, from the map and description filed by the party, and forward the same to this office with regular abstract and reference to your action; or, if you are unable to determine the locality of the land in the public surveys, you will report the fact, forwarding therewith all the papers in the case, for our action."

In 1878, a new circular was issued which repeated the provisions of the circulars of 1864 and 1872, above quoted (2 C. L. L., 1355; 5 C. L. O., 126.)

If the regulations so laid down are to govern, there is no question but that your decision should be affirmed. The Indian had nothing to do with these locations. The facts were freely stated by the able counsel who orally argued the questions involved. They are very simple. In every instance, the half-breed sold his scrip many years before this attempted location of it and received from the purchaser the agreed price therefor; but because of the prohibition in the act of Congress against transfers, the transaction took the form of a delivery of the scrip accompanied by two letters of attorney in printed form, duly signed and acknowledged but as to the name of the attorney and sometimes if not always as to all of the particulars of description, left in blank; by one of which letters the attorney was authorized to locate the scrip and do whatever might be necessary for that purpose or to obtain a patent, and by the other of which the attorney was authorized to sell and convey by any proper deed any land which the half-breed might thereafter acquire in the United States. Both letters were declared irrevocable, and contained the usual provisions in such instruments. The manner of use of these letters of attorney has been to file with the scrip in the Land Office the one authorizing the location of it not disclosing the existence of the other.

Nothing therefore, to challenge the bona fides of the transaction then appears on the surface, nor any reason why the Land Office should not recognize it as the fair exercise of the right to do by an attorney what one might lawfully do himself. When the location is made, if validly made, the title vests at once in the person to whom the scrip was issued; and thereupon a conveyance of the land is executed by some person who consents to the use of his

name as attorney, under the authority of the other letter of attorney, the blanks of which are filled accordingly.

Thus the title passes to the party owning the scrip. And thus by circumvention, the thing is done which the statute forbds to be done; and the exercise of the privilege of doing by attorney what one may do himself is made operative to accomplish the doing by attorney of what the half-breed could not do himself. The scrip, with these blank letters of attorney pinned to it, passes into the market and is sold, and transferred by mere delivery, as freely as a Government Bond. The half-breed about whom this protecting limitation was thrown disappears as effectually from consideration as if he were dead until some contestant hunts him up to find a basis for a contention against the scrip. The location is often times not made for many years after the original sale by the half-breed; in this case, the certificate of acknowledgment on each of the several letters of attorney is dated as far back as 1871 or 1872. It may well be thought that in many instances the location has been made after the half-breed's death.

It is a rule of law, so familiar as to require no authority, that when a transaction is contained in various contemporaneous papers or documents, or when partly in parole and partly in documents, its character is not to be judged by reference to one paper alone, but all the documents, besides any parole addition, are to be taken together to ascertain what in fact the agreement was, and it will be judged according to its nature as so ascertained. Applying this rule, the transaction by which the half-breed parts with his scrip would be, if written, substantially like this:—

"In consideration of ..... dollars, to be paid by J. S., I hereby sell and transfer to him the scrip issued to me by the United States (describing it); and to circumvent the statutory prohibition, I have signed two letters of attorney

in blank, the one to locate the scrip, the other to convey the land when the scrip shall be located, and I agree that by whomsoever these letters of attorney may be executed I will hereafter make no claim to the scrip or the land."

Unless the letter of attorney which should accompany such an agreement might be regarded as valid notwithstanding the agreement, they have no validity in such a case as this. They are smply parts of a prohibited transaction, and although such an attorneyship, if an independent and bona fide transaction, would be valid, yet, it does not follow that the letter of attorney is to be respected when found constituting a part of a transaction which cannot be supported in law.

The case of Gilbert vs. Thompson (14 Minn., 544), by no means goes the length of holding such a transaction valid, while there are expressions in it indicating that the Court would have been unwilling to so decide. In that case a letter of attorney given by the half-breed to a particular person to make a deed of land to be located in a particular county, which was fully executed within two months, was upheld, being apparently considered the fair evercise of the right to appoint an attorney to do what the party could do directly. But the court said:

"A power of attorney, so far as intended to operate as a transfer, would be of no avail; the right of the half-breed in the scrip and the land would remain the same; it could not be made irrevocable nor create any interest in the attorney."

And again:

"Whether the power to sell would be upheld in an instrument, upon its face a transfer, the former being only incidental, we do not decide."

Unless an agreement by the half-breed, by which, for a consideration presently paid, the other party was authorized to locate the scrip on any land he saw fit, and, secondly,

the half-breed agreed immediately thereafter to convey the same to the other party, should be respected in the Land Office as no assignment or transfer of the scrip, I am unable to perceive upon what reason a letter of attorney, which is but a part of precisely such a transaction, can be upheld.

It is, however, unnecessary to decide what might be the effect of a location so made upon surveyed lands open to pre-emption or private sale. This case relates to unsurveyed land, and a further limitation is imposed both to mark and to restrict the personal right of the half-breed to take such land; he is required to have made improvements upon it. The theory of counsel for the scrip claimants is that the half-breed may make improvements by an agent. This may be granted; but the difficulty with the case is that the improvements were not made for the half-breed in any sense whatever; they were made for the supposed attorney, at his expense, and with no purpose to admit the half-breed to any interest or benefit in connection with them or with the land.

If such a transaction can be supported, then this half-breed's scrip, issued with such precautionary restrictions of law upon the right to use it, has, by this ingenious invention, become invested with a quality specifically denied to it by Congress, the quality of negotiability whereby the holder of it without regard to his relationship to the original beneficiary is clothed with the power to purchase with it unsurveyed lands of the United States; the value of which privilege, in the presence of the rapid development of the country by the agency of railways and from multiplying population, would be very great. It seems to me too plain for question that the duty of the Executive Department, charged with the supervision of the public lands, was to provide such regulations as would limit and restrict the

use of this scrip wthin the bounds which Congress intended, and that, although the same words were not employed with respect to the Indian which are found in the statutes concerning the settlement of citizens upon the public lands, yet it was intended, keeping in view the difference between Indians and civilized persons, to express the same general idea; and that the case in which the half-breed could locate his scrip upon unsurveyed lands was only when he had in fact made improvements for himself and for his own benefit upon the land. It is not said that he must have a dwelling there, but the requirement of mprovements must have some substantial significance. It is not satisfied by doing something which is a betterment of the land but of too slight a character to mark anything more than a pretext of compliance. Thus ploughing is an improvement of land; but it would be no satisfaction of this statute if a fraction of an acre were to be broken by the plough, although it would be so far improving the land. It is more probable that the legislative mind contemplated such improvements as the half-breed Indian would naturally make upon land of his own, which almost inevitably includes some sort of a dwelling-place. At all events, I do not think that the regulation which requires evidence that the Indian has a direct connection with the land and is claiming the same for his personal use, is open to the least fair criticism, but that it is one calculated to effectuate the purpose of the statute and should be supported.

The absence of any proof that the respective Indians were in any wise concerned in the location of the several pieces of scrip involved in this matter, indeed, the plain proof that none of them had anything to do with it, constituted, therefore, a plain and sufficient reason why the Register and Receiver should have rejected the application to locate the scrip as required to do by the circular, and they violated the instructions in not doing so. For this

reason alone your decision against the validity of the scrip location was correct in my judgment.

It is contended that upon the location being made, under the circumstances stated, the title passed at once out of the United States, as effectually as the title to lands granted to aid a railroad pass upon the filing of the map of definite location, and the decision in Larriviere V. Madegan (1 Dillon, 455) is relied upon. That case simply held that the location of the land with the scrip, under the Act of July 17, 1854, passed the fee of the United States into the person to whom the scrip was issued. Ths doctrine may be accepted. But it hardly needs argument to establish that in order to such an effect, the location must be one authorized by the act of Congress, and this position is not the least antagonistic to the decision cited, for in that case there had been a valid location, the court in the recitation of facts stating that the clamant under the scrip located said scrip "upon the property in dispute fully complying with the instructions of the General Land Office." If a piece of the scrip were stolen and a letter of attorney forged, and thereby a location made, it is plain that on proof of the facts the Commissoner would cancel it and that the scrip should be returned to the half-breed to whom it belonged. In like manner if the scrip be actually in the hands of parties seeking to locate it for their own benefit, contrary to the statute and regulation under it, it is equally in the power of the Commissioner to reject the application and deny the attempt to so misuse the scrip, and secure public land without right thereto.

It is also contended that the adjustment of the scrip after the survey was a location upon surveyed land, and no improvements were necessary. I do not think this can fairly be maintained. The act authorizes the location of the scrip upon unsurveyed lands, by the same words in which it authorizes the location upon surveyed lands, and the rule

laid down in Larriviere vs. Madegan is as applicable to the one case as to the other. The title passed out of the United States to the half-breed when the scrip was rightfully located upon unsurveyed land to the land upon which it was so located. It may be doubtful whether he could be required to change the boundaries of his location because they did not correspond with the government subdivisions of the subsequent survey. But waiving that question, the subsequent adjustment by him or with his consent must be taken as having relation to the time of the location and merely as giving description according to government survey of land which was already his. It is but an adjustment of boundaries in perfection of a location previously made and having relation back to the time of the location; not an original location of the scrip.

I have heard full argument by able counsel of the question involved, and am entitled to presume from the character of the gentlemen employed, as well as from the obvious skill and research exhibited, that every resource of reason and the books has been exhausted to sustain the claim of this location. But continued reflection has begotten a firm conviction that it is the duty of the department, in administering this law, to give effect to these limitations, for the existence of which there was obvious reason, and which were plainly declared in the statute. To do otherwise would be to lend the aid of the department to defeat the law which it is established to administer and enforce. The regulation which was the basis of your decision, and is so sharply criticised as unauthorized, is not an addition to the law. It is but a rule of evidence to show that the law has been in fact observed. Nor can parties justly make claim to hardship by the enforcement of this rule. It has existed since 1872, and must have been known to them; and when they attempted to locate this scrip in disregard of it, they took the risks that it would be enforced

if determined to be invalid. They have nothing to complain of because of the failure of an attempt which they made with such notice of its risks.

I have not considered it necessary to point out the many minor informalities apparent in these locations. For the reasons herein set forth I concur in the judgment of your office that the various scrip locations involved in this case are invalid and that part of the decision appealed from which holds said locations for cancellation is affirmed.

* * * * * * * * *

APPENDIX K.

Allen et al. vs. Merrill et al., (on review) 12 L. D. 138.

SYLLABUS.

Sioux half-breed scrip is intended by the statute as evidence of a purely personal right in the half-breed to locate and receive patent for the number of acres named herein, and cannot be used as a means to secure title to lands except for the sole benefit of the half-breed himself.

A location made by one acting in his own interests, and not for the use and benefit of the half-breed, is in contravention of the statute under which the scrip is issued.

The right to locate this scrip on unsurveyed land can only be exercised where the half-breed has made improvements on such land, and the improvements in such case are a condition precedent to the location, and must be made for the use and benefit of the half-breed.

Circular regulations, not in conflict with the statute under which they are issued, have all the force and effect of law.

SECRETARY NOBLE TO THE COMMISSIONER OF THE GENERAL LAND OFFICE,

JANUARY 28, 1891.

* * * * * * * * *

This brings me to consider the important question to be determined on this review. It relates to the validity of the scrip location and is presented by the several joint contentions of the claimants thereunder.

It is perfectly plain to my mind, as a matter of original construction, that by the Act of Congress the scrip in question was intended to be the evidence of a purely personal

right in the half-breed to locate and receive patent for the number of acres of land therein called for. That this is true is clearly shown by the declaration in the act that no transfer or conveyance of the scrip shall be valid. If the scrip could not be legally transferred or assigned, it must necessarily follow that it could not be used as a means to acquire title to lands by any person other than the half-breed himself, or by his agent or attorney. It was therefore, obviously intended for the sole benefit of the half-breed. It could be lawfully located only by him in his own proper person, or for his sole use and benefit, by his legally constituted agent or attorney. These propositions will scarcely be seriously questioned. They are the result of the clear and unambiguous provisions of the statute. In view thereof, do the locations in question come within the intendment of the law? That they are not made by the half-breeds in person is beyond queston. In my judgment, it is equally clea so far as the present record shows that they were not made by a legally constituted agent or attorney, and for the sole use and benefit of the half-breeds named.

They were all upon unsurveyed lands. In the Huot case the location was made by Winston. The record fails to disclose any authority whatever in him to make the location or to act in any manner in the premises. The alleged letter of attorney authoizing the location was given to W. W. Hale without power of substitution. Hale could not therefore have delegated to another the authority thus delegated to him by the half-breed, even if he had attempted to do so. There does not appear, however, to have been any such attempt. While the only application in the record purports to have been signed by Hale as the attorney for Huot, it bears date long after the location was made, and was evidently nothing more than a mere blank form at the date of the location and remained so until after the lands were surveyed. Hale had nothing to do with the location

He simply appears, at some time or other, to have signed a blank form of application and placed it in the hands of Winston, who made the location, not for the use and benefit of the Half-Breed, but for the sole use and benefit of himself. The record shows that his contract with Hale was that the latter, as attorney for the Half-Breed, should convey the lands to him after the location had been made, and that a conveyance was executed in pursuance of such contract. It thus appears that the Huot scrip was attempted to be used by Winston as a means to acquire title in himself to a portion of the public lands plainly, in my judgment, in contravention of the letter and spirit of the statute.

It is vain to claim that the location was made by him as the attorney for the Half-Breed. In the first place, there is no evidence of any such attorneyship, as has been already shown, and, in the next place, it clearly appears that Winston acted for himself in making the location and not as the attorney for anybody. Action by an attorney as such, necessarily implies the existence of a principal, and that the action is for the principal. Such was not the case here. As a matter of fact the scrip had been sold by the Half-Breed, and coming in the course of time into the hands of Winston, he used it for his own benefit. It was evidently not contemplated that the Half-Breed should have any beneficial interest in the land sought to be acquired by the use of the scrip.

The several locations made by Merrill depend upon substantially the same state of facts, both as to the means used, and the results sought to be obtained. Some differences, however, exist. In the case of Young and Carron the letters of attorney were given with authority for substitution, and it appears that the attorney, Shillock, did substitute one Williams to act in his stead in the premises, but there is nothing to show that Merrill had an authority directly or indirectly from the Half-Breeds to make the locations. In

the case of Joseph Brown, if the letter of attorney be accepted as genuine according to the purport of its face, it follows, necessarily, that Merrill acquired no right by virtue of that power to locate the scrip in question. He could not, under that power, locate any other scrip than that therein described, namely: "No. 516, letter D." If, on the other hand, we go outside the letter of attorney to seek an explanation of the discrepancy between the scrip located aod that therein described, it appears, according to Merrill's own showing that the alleged letter of attorney was, when signed by the Half-Breeds, nothing more than a mere blank form, and therefore carried with it no authority for any purpose. It is difficult to conceive how it can be seriously claimed that this letter of attorney gave Merrill any authority concerning the scrip, "No. 596, letter D", which he attempted to locate thereunder.

It is apparent here, as in the Huot case, that the scrip was located by Merrill not for the benefit of the Half-Breed, but for the sole use and benefit of himself. There was on his part no agency or attorneyship for the Half-Breeds. It was not contemplated that they should acquire by the operation any beneficial interests in the lands. In each case the scrip was used by Merrill as a means to acquire title in himself to the lands in question. It is proper also to note that in the Carron case there was no evidence presented showing the death of the scripee, Napolean Carron, or that Lewis Carron was his sole heir. This location was therefore not made in accordance with the instructions of November 12, 1874, above referred to. So far as this record shows the scripee may be a living person.

It is contended with great earnestness that these locations are valid, notwithstanding the manner in which they were made. In support of the contention several authorities are cited from the courts. They are the cases of Gilbert vs.

Thompson, (14 Minn., 514); Thompson vs. Myrick, (20 Minn., 205); and the latter case in the Supreme Court on appeal (99 U. S., 291). These authorities have been examined. In my judgment they do not go to the extent claimed for them.

In Gilbert vs. Thompson, the case chiefly relied upon, both parties claimed title to the land, which was the subject of controversy, through one Amelia Monette, Sioux Half-Breed. The plaintiff claimed by deed directly from Monette, dated May 29, 1867, and the defendant by deed from one Benjamin Lawrence, as attorney in fact for said Monette, dated July 18, 1857. By the power of attorney under which the latter deed was executed Lawrence was authorized by Monette,

> For me and in my name to enter into and take possession of all the real estate belonging to me, or of which I may hereafter become seized, situated in the County of Wabasha, in the Territory of Minnesota; and for me to lease, bargain, sell, grant and confirm the whole or any part thereof; * * * * * * and for me and in my name to make, acknowledge and deliver unto the purchaser, or purchasers, good and sufficient conveyances.

As against this showing of title in the defendant, the plaintiff offered to prove by parol evidence that the lands were acquired by means of scrip issued to Monette, the Half-Breed, under the act of July 17, 1854, and that the transactions at the date of the power of attorney involved a transfer of the scrip, and were therefore designed to evade and defeat the Act of Congress. The court held that the power of attorney could not be thus contradicted, and declined to admit the testimony; and as between the contending parties, the title in the defendant was upheld. In its opinion the court said:—

> It was the intention of Congress that the right to acquire public lands by means of this scrip,

should be a personal right, in the one to whom the scrip issued, and not property in the sense of being assignable; but no restraint is imposed upon the right of property in the land, after it is acquired by location of the scrip. In the scrip itself, the Half-Breed had nothing which he could transfer to another; but his title to the land, when perfected under it, was as absolute as though acquired in any other way. It follows therefore, that any attempt to transfer the scrip, directly or indirectly, would be of no effect as a transfer. * * * * A power of attorney, so far as it intended to operate as a transfer, would be of no avail, the right of the Half-Breed in the scrip and land would remain the same; it could not be made irrevocable, nor create any interest in the attorney. Should the attorney sell under it, he would be accountable to his principal, precisely as in the case of any power to sell; but a simple power to sell, executed by a Half-Breed is good till revoked, and would extend to lands subsequently acquired by means of scrip, if such lands came within its terms. We think such a power could not be varied by parol proof that the parties had an intention not expressed in it, even to defeat the power, except on the same grounds as would admit such proof in other cases. * * * Whether the power to sell would be upheld in an instrument, upon its face a transfer, the former being only incidental, we do not decide.

The controlling points in the case, as decided by the court, plainly were (1) that a simple power to sell, executed by a Half-Breed, such as the one there considered, would extend to lands subsequently acquired by means of scrip if within its terms, and (2) that parol proof of an intent coincident with the creation of the power to transfer the scrip, could not be received to defeat the power.

These propositions furnish no support, in my judgment, to the contention in behalf of the locations here in ques-

tion. That a power to sell may extend to lands afterwards lawfully acquired by means of scrip is not attempted to be controverted; and no question relative to the admissibility of evidence, such as that considered by the court, *can possibly* arise in this case, for the simple reason that the Government is here a party interested, whereas the controversy in that case was between contending claimants for the land after the Government had parted with its title. While the rule of evidence laid down may properly be enforced in controversies in the courts between individual claimants, it does not follow that such a rule is to be here applied as against the Government whose interest it is, before it parts with its title, to see that the law has been faithfully complied with. It is entirely within the jurisdiction of this Department to inquire into the matters alleged against the present locations no matter by whom or how they are presented; not only for the purpose of passing upon the equities of the case as between contending claimants, but for the purpose of ascertaining whether the requiremerts of law have been fully met. It is with this view primarily, that the present inquiry is made, and I know of no rule of evidence to exclude any testimony relating to the character of the locations. That the court did not pass upon the question here involved is clearly shown by their statement that "we do not decide" whether a power to sell contained in an instrument on its face a transfer, the power being merely incidental to the transfer, would be upheld. That is the question here—the only difference being the manner of its presentation. It properly arises here on the record; in Gilbert vs. Thompson it did not, the evidence of the transfer being excluded on technical grounds and therefore was not decided.

Thompson vs. Myrick goes no further. It does not reach the question in the case at bar. It was in fact ruled on Gil-

bert vs. Thompson by the State Court, and that ruling was affirmed by the Supreme Court on appeal.

The case of Sophia Felix (unreported) is cited from the Department. It was decided in 1863. In that case, however, there was nothing to show that there had been in fact a transfer of the scrip by Felix, the Half-Breed. On the contrary, it appeared that she had signed the application to locate her own scrip, and there being no proof to the contrary, her signature was accepted as genuine, and the location allowed as for her use and benefit. "Whether she could sell or did sell the land after the location of her scrip," said the Department, "we need not inquire, and the validity and effect of any such sale or assignment must be left to the arbitrament of the courts." The case therefore does not go to the extent of holding valid such a transaction as that here considered.

The next question relates to the improvements required on unsurveyed lands. The act provides that the scrip "may be located," among other lands upon any "unsurveyed lands, not reserved by Government, upon which they," (the Half-Breeds) "have respectively made improvements." I think this language clearly makes the improvements a condition precedent to the location. Congress has specifically declared what lands shall be subject to the scrip, thereby excluding all other lands than those defined, from the right of location. If unsurveyed, they must be lands upon which the Half-Breeds have made improvements, or they cannot be located with the scrip. The improvements constitute a part of the description of the lands defined as locatable.

This view is strictly in accord with the uniform construction given the act by the Department, shown by the circulars of instruction from time to time issued thereunder as above referred to. And in the Sophia Felix case, supra, it was expressly stated, speaking of unsurveyed lands, "that

improvements are requisite as an antecedent to the right of location."

But it is in the third place contended in effect, that these circular instructions are in contravention of the provisions of the act, in that they impose upon the scripee conditions not authorized thereby. I do not so regard them. It was clearly within the power of the Land Department, and, indeed, it was its plain duty, to issue such regulations as were deemed necessary, to secure a faithful administration of the law, and to prevent its evasion. It was thus required that when locations were sought to be made upon unsurveyed lands, evidence should be furnished showing that the lands contained improvements made by the Half-Breed, or under his personal direction; in other words showing that the Half-Breed had a direct connection with the land, and was claiming it for his personal use. This requirement is in no sense in contravention of the statute. It adds nothing to it. Unsurveyed lands are not locatable under the act, unless they contain improvements made by the Half-Breed. The regulation simply furnishes a means of showing that in this respect the law has been observed. It goes no further. Not being in conflict with the statute, these regulations have all the force and effect of law. Hessong vs. Burgan (9 L. D., 353), and cases cited.

The evidence thus requred was not furnished when the present locations were made. The facts are that the improvements were not made by the Half-Breeds, or for them in any sense whatever. They had nothing to do with the locations, and there was no purpose that they should have any beneficial interest in the improvements or in the land. It is not denied that improvements may be made by an agent. That was not the case here. They were made by the parties locating the scrip, not for the Half-Breeds, but for their own use and benefit. This it seems to me was in

violation of the letter and spirit of the statute. The further contention is that these locations should be sustained for the alleged reason that they were made in accordance with the then and previously prevailing practice of the Department in like cases, under which it is claimed patents have heretofore uniformly issued. On this point a number of cases, in which patents have gone out, are cited from the files of the Land Department. Two only are claimed to bear directly upon the question of the transfer of the scrip. These cases have been examined. They are not analogous to the case at bar. There is nothing on the face of the record in either of them even tending to show that there had been a sale or transfer of the scrip. One of them (Josette St. Germaine, scrip No. 628, Letter A., R. & R. No. 99 San Francisco, California), was a case in which there was a power of attorney executed by the Half-Breed, authorizing the attorney named, or his substitute, to locate the scrip, and upon such location to sell the land. By letter of substitution, duly executed, the attorney appointed another to act in his stead. Application was made to locate the scrip December 24, 1866, several months after the lands had been surveyed in the field, and the certificate of location bears date Februray 11, 1867, the day on which the plat of the survey was filed in the local office. In the other case (Nancy Rock, Scrip No. 94, Letter C., R. & R. No. 108, Otter Tail, Minnesota), there was also a letter of attorney authorizing the location of the scrip and the sale of the land. The application and certificate of location both bear date December 17, 1860, after the lands had been surveyed and plat filed.

Whatever may have been the real facts of these cases, it is certain that the records do not disclose anything tending to impeach the bona fides of the locations. It was upon the papers filed that the Land Department acted in passing

the locations to patent. These papers showed a simple power given by the Half-Breed to locate his scrip and to sell the land after location. That this could lawfully be done is not questioned. The record failing to show anything to the contrary, the necessary legal presumption was, and is, that the locations were lawfully made. These two cases, therefore, furnish no support to the present contention.

The other cases relate chiefly to the question of improvements on unsurveyed lands. Quite a number have been cited. It is claimed with reference to them that the locations were made on unsurveyed lands and afterwards adjusted to the public surveys and passed to patent without any improvements being shown or required. Most of these cases have been examined. With few exceptions they are found to be cases wherein the application to locate was presented after the lands were surveyed in the field. The certificates of location were issued after the plats of the survey were filed in the local office. The locations were generally made by attorney, but in no case is there anything on the face of the record to show that the transaction may not have been simply the bona fide exercise, by the Half-Breed, of the right to do by attorney what he might lawfully have done himself. It is not necessary to comment upon what appears to have been the practice in those cases. They are not analogous to the cases here. That fact is a sufficient answer to the contention of counsel. But few cases are found of locations made before actual survey in the field, in which improvements were not shown. In those, it may be said, there appears to have been no other defect in the locations, and therefore they differ very materially from the cases now under consideration.

Upon the whole, the cases cited failed to show in my judgment that there has existed that uniform practice which is claimed to have prevailed. I find nothing there-

fore in the former practice to justify the Department in approving the locations in this case. The discussion may properly end here. It follows from what has already been said that there is no error in the decision on review, of which Merrill or Winston can complain.

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APPENDIX L.

Hyde et al. vs. Eaton et al. (on Review), 12 L. D., 157.

SYLLABUS.

If the location of Sioux Half-Breed scrip is illegal and invalid, a deed of ratification executed by the beneficiary can not give it validity; nor will such deed preclude the Department from inquiring whether the improvements placed on the land were in fact for the personal use and benefit of the beneficiary. * * *

SECRETARY NOBLE TO THE COMMISSIONER OF THE GENERAL LAND OFFICE, JANUARY 28, 1891.

I have considered the motions filed by the parties in interest asking for a review of departmental decision of February 18, 1889 (undeported), in the case of Thomas W. Hyde and Angus McDonald vs. Frank W. Eaton and Orillie Stram and Fred F. Huntress second contestant, involving Sioux Half-Breed scrip locations of lots 3, 5 and 6, and the se 1-4 of the nw 14, sec. 30, T. 63, N., R. 11 W., under certificate 19 "D." and of lots 1 and 2 and the sw 1-4 of the ne 1-4, and the nw 1-4 of the se 1-4 same section, under certificate 19 "E," in the Duluth, Minnesota land district; also the application of Thomas W. Hyde to file pre-emption declaratory statement for lots 5 and 6, the se 1-4 of the nw 1-4 and the ne 1-4 of the sw 1-4 of said section, and the application of Angus McDonald to file pre-emption declaratory statement for lot 2, the n 1-2 of the se 1-4 and the sw 1-4 of the ne 1-4 of said section 30; and also the application of Huntress to contest both the scrip locations and the claims of Hyde and McDonald.

The facts pertaining to these various claims are sufficiently set forth in the decision complained of, and it is not deemed necessary to recapitulate those facts here.

On the part of the scrip claimants, twenty-one specifications of error are assigned. These specifications, except such as are hereinafter specifically mentioned, present questions which were presented in the motion for review in the case of Allen et al. vs. Merrill et al., and which are in the decision this day rendered therein fully discussed. The conclusion reached there is adopted here, and further discussion of those questions is unnecessary.

The first specification, which is in the following words: "Error in fact holding that Frank W. Eaton filled up the blanks in the power of attorney to locate, inserting his own name as that of attorney in fact for such purpose," is without merit. Eaton states in his testimony (p. 67) that the power of attorney was filled out after it had been acknowledged and after it was received by him, and whether the act of writing in his name as the attorney in fact was performed by him or by some one else is wholly immaterial.

In the eleventh and twelfth specifications it is insisted that the location of this scrip June 16, 1883, after the execution of the power of attorney May 25, 1883, was such an immediate and timely execution of the power as to take this case out of the general reasoning in the case of Allen et al. vs. Merrill et al., and that it was error to assume as a fact applicable to this case "that in every instance the Half-Breed sold the scrip many years before the attempted location of it." Admitting that there was error in the decision complained of in the statement quoted, it is not of sufficient importance to justify a conclusion different from that heretofore reached. The important and controlling facts remain, and the mere fact that the power of attorney was executed a few weeks only prior to the date of the location, in-

stead of years, is not material. There is nothing in the matters set up in these two specifications to justify the granting of this motion.

The sixteenth specification alleges that there was "Error in law in not finding and holding that the deed of ratification and confirmation executed by said scripee precluded any examination into the facts as to whether the improvements on these lands were made for her personal use and benefit." I do not think the position taken by the Department on this phase of the case has been successfully assailed in the arguments advanced in support of this specification. The question is not one between the beneficiary of this scrip and her alleged attorney in fact, but is one between the claimants under the scrip locations on the one side and other claimants and the United States on the other; and as against the United States or claimants in good faith under the public land laws, the deed of ratification can have no effect. The question to be determined is whether the locations in question were made in good faith in accordance with the law and regulations. As was said in the decision complained of: "If the location of the scrip was illegal and invalid, then the deed of ratification could not give it validity—could not vitalize that which had not in it the germ or essence of legal validity." There was no error in said decision on this point.

This disposes of all specifications of error in the motion for review filed in behalf of the claimants under said scrip locations adversely, and the conclusion reached in the original decision in regard to these locations will be adhered to.

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